United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

Docket No. 74-2379

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

HARRY F. HART,

Appellant.

On Appeal From The United States District Court
For The Northern District of New York

APPELLANT'S APPENDIX

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FOR THE SECOND CIRCUIT

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vs	:	Northern District of New York
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PRE-TRIAL SUPPRESSION HEARING.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

HARRY HART,

Defendant.

The following proceedings took place commencing on the 21st day of March, 1974, at the United States District Court, Northern District of New York, Federal Building, Albany, New York, before HONORABLE JAMES T. FOLEY United States District Judge, and a Jury.

APPEARANCES:

JAMES R. SULLIVAN, JR.
United States Attorney
Brian Mumford, Esq.
Assistant United States Attorney
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Pre-Trial Suppression Hearing.

* * * * *

THE COURT: All right, as I understand it now we are here for a suppression hearing on two separate motions that were filed by Mr. Steiner for this defendant. One was returnable March 4, as I read it, and I think I heard it on March 6th and deferred it until the time of trial, and the time of trial, of course, is today, because we have already drawn a jury.

The other motion to suppress was made returnable this morning at 10:00 o'clock and was filed yesterday in the Clerk's Office at 3:04 p.m. So I am ready to take testimony, Mr. Steiner. You have the burden, of course, to support your motion, and I am ready to proceed with the hearing.

I assume, Mr. Mumford, you are prepared to present your side of it?

MR. MUMFORD: Yes, we are ready, Your Honor.

MR. STEINER: The defendant is ready, Your Honor.

THE COURT: All right.

MR. STEINER: The defendant, if the court

please, will call Harry F. Hart.

HARRY F. HART,

called as a witness in behalf of the defendant, being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEINER:

Q Mr. Hart, what is your full name?

A My full name is Harry F. Hart.

Q Where do you reside?

A Glens Falls, New York.

Q On LaRoe Street?

A 51 LaRoe Street.

Q Are you the defendant in this action?

A Yes, sir.

MR. STEINER: May we have marked for identification, Your Honor, a memorandum of an interview dated September 16, 1969 at which Harry F. Hart, this defendant, David Smith and Joseph A. Duchna were present.

THE COURT: Have the clerk mark whatever you wish for identification.

(Document marked Defendant's Exhibit A for identification.)

BY MR. STEINER:

Q Mr. Hart, I now show you Defendant's Exhibit A for identification and ask you if you attended a conference on September 16, 1969 at the Internal Revenue Service at Glens Falls, New York, at which Joseph A. Duchna, Special Agent, David T. Smith, tax technician, and you as taxpayer were present?

A Yes, I was.

Q Will you tell the court exactly what happened prior to and during this interview?

A Well, this interview here is the one that all my papers and my books and everything, which I gave them all to him, before then Mr. Smith took a lot of my books before he had Mr. Duchna, he had before he had come up, then he had Mr. Duchna come up and we had the first meeting there at which he asked for a lot of more things and papers and everything.

THE COURT: Where was that?

THE WITNESS: In Glens Falls.

THE COURT: What place?

THE WITNESS: He called me up to my home, up to the place in Glens Falls.

THE COURT: Did he go to your house and talk to you first?

THE WITNESS: At one time him and Mr. Smith had been to my house and asked for records, and then

they asked to go through my safety deposit box. He said if I gave him the right, he wouldn't have to get a search warrant. I gave these people all my records and all my bank statements and everything they asked for.

THE COURT: All right.

BY MR. STEINER:

Q Did he say anything to you about a search warrant?

THE COURT: You better fix the time, because we have a conversation at one time with three or more people and then Mr. Smith going to visit him, I don't know which is which.

BY MR. STEINER:

Q Tell the court, Mr. Hart, when and where the first conversation occurred and who was present.

A Well, the first conversation occurred me and Mr. Smith, I brought stuff up to Mr. Smith in Glens Falls.

Q Where did he meet you?

A He didn't meet me, I brought them up to his office, he called me up and asked me and I --

MR. MUMFORD: Could he establish a time, please.

THE COURT: I think he should, because it is meaningless to me. You were given a telephone call by somebody?

THE WITNESS: Mr. Smith, I believe, called me up the first time.

BY MR. STEINER:

Q And can you fix the time, Mr. Hart, when he called you?

A No, that's quite awhile ago.

Q Was it prior to September 16, 1969 when you met with him and Mr. Duchna?

A It was before then that I met Mr. Smith.

THE COURT: He called you up on the telephone, asked you to bring all your records?

THE WITNESS: He asked me to bring up a year of records, 1966, I believe, '65 or '66.

THE COURT: He called you at your office or house?

THE WITNESS: Yes.

THE COURT: You brought the records where?

THE WITNESS: Up to the Revenue office up in Glens Falls.

THE COURT: You got them all together and brought them right there?

THE WITNESS: Yes sir.

THE COURT: All right.

MR. STEINER: Then what happened Mr. Hart?

A Then I went, or there is a little time afterward, I'd

say a week or probably longer, Mr. Smith called me up again and told me that Mr. Duchna was coming from Albany and he wanted some more records, '66 and way back, so I dug up everything I had down in the cellar and I brought up my daily books and all my papers and everything I had. I gave him everything I had and I never dreamed at one time I was up for defrauding the government, I didn't dream I was up for that.

Q At this interview --

MR. MUMFORD: I didn't hear that.

THE WITNESS: I never dreamed at one time that I was ever being up for incrimination by the government, and they never give me no intention of that.

BY MR. STEINER:

Q Tell the court exactly what occurred at the beginning of the interview at the Internal Revenue Service in Glens Falls on September 16, 1969 which began at 10:15 a.m. and lasted to 11:45 according to the report.

A I don't know if I brought up all the rest of the books and papers, and I sat down with him and we went through all the checks and he asked me what this check was for, whether it was personal or business, and went through all that stuff there. I don't know

if that was the last meeting or not, I don't know, I just can't remember.

THE COURT: He is asking about that particular date.

THE WITNESS: Well, that is the day -- a couple of times we done it, but that day we done it too.

THE COURT: Who was there, three agents?

THE WITNESS: Mr. Duchna and Mr. Smith.

THE COURT: And did they ask you questions?

THE WITNESS: Asked me what these checks were for, what this check was for, whether it was a business check, personal check, went through the whole year.

BY MR. STEINER:

Q What did Mr. Duchna tell you?

A Then he told me that the last time I see him, he says "You either owe us money or we owe you money and you will hear from me."

THE COURT: When did he tell you that?

THE WITNESS: The last day I seen him.

THE COURT: What date was that?

THE WITNESS: I think that was '68, that was the last day, I think.

BY MR. STEINER:

Q Is it your best recollection that that was at the interview of September 16, 1969?

A It could be, that was the last interview I had with him and Mr. Smith, and that's what he told me.

Q Did anyone at that time tell you that criminal -- that you were under criminal investigation?

A Nobody at anytime.

Q Since this has been going on, did you ever know you were under criminal investigation?

A No sir, and I never knew it until one time, and I heard it on the radio and read it in the papers, then two days afterwards I got the papers on it, the summons, or whatever they call it.

Q When you say two days later you are referring, are you not -- may I hold that a moment. Will you mark these for identification.

(A group of documents marked Defendant's Exhibit B for identification.)

BY MR. STEINER:

Q Mr. Hart, you have just testified that was in 1972 that you first heard that you were under a criminal investigatory examination for tax fraud. I now show you Defendant's B for identification, ask you what that is.

A That is the letter I got two days after I heard it.

THE COURT: What date is that letter?

THE WITNESS: That is July 3, 1972.

MR. STEINER: The envelope shows delivery on July 3, 1972.

MR. MUMFORD: Is that in evidence? If it is going to be an offer, could it be put in before it is testified from?

MR. STEINER: Well, it is going to be offered in evidence in a few moments.

BY MR. STEINER:

Q Is this the letter --

THE COURT: Well, we can't talk about it unless you offer it. Do you want to offer it?

MR. STEINER: Yes, I will offer it right now. I thought you would want it qualified.

THE COURT: He may not object to it, then we won't have to bother with a foundation.

MR. STEINER: Perhaps not.

MR. MUMFORD: I have no objection, except there are some hand-written notes on the margin. If Mr. Steiner would either have it explained or deleted, and also if he would lay a foundation for the envelope that is on it. I object to the envelope going in, not the letter.

MR. STEINER: May I also have the envelope

marked for identification, please, the envelope attached to the letter?

MR. MUMFORD: We have no objection other than to the handwritten notes in the margin of the letter.

THE COURT: I will receive it.

(Defendant's Exhibit B for identification was marked in evidence.)

MR. STEINER: This is off the record, if I may. The handwritten notes are illegible to me.

THE COURT: Is this the letter that he had in his possession?

MR.STEINER: Yes.

THE COURT: He may know, Mr. Hart may be able to tell us. Are those your handwritten notes? Take a look at it, do you know whose writing that is?

THE WITNESS: No, I haven't any idea, unless that was Mr. Canale that wrote that there. I never got a lawyer until --

THE COURT: If we get involved with a jury, we will have to delete it.

MR. STEINER: We have no objection. I don't know what the marginal note says.

THE WITNESS: It is just a scribble.

BY MR. STEINER:

Q Mr. Hart, I now show you what purports to be a letter dated June 30, 1972 on the letterhead of the District Director of Internal Revenue Service and signed by the Chief of the Intelligence Division and ask you when and how you received that letter.

A I received that two days after I heard it on the radio and read it in the paper.

Q What did you hear on the radio and read in the paper?

A Well, it was on the radio that I was up for indictment and I could be fined up to $10,000 and put in jail for five years.

THE COURT: Well, that is what the statute says, but you heard that on the radio?

THE WITNESS: On the radio and in the papers.

THE COURT: That was two days after you got indicted?

THE WITNESS: That was two days before I got this.

THE COURT: You heard it on the radio you were indicted?

THE WITNESS: Yes.

THE COURT: Then you got this?

THE WITNESS: I got this two days afterwards.

THE COURT: All right.

BY MR. STEINER:

Q How did you receive the letter from the Internal Revenue, Mr. Hart?

A It was a registered letter.

Q Isn't it actually certified mail?

A Yes, certified mail.

Q And when did you receive the letter by certified mail?

A July 3, 1972.

Q And what did this letter notify you?

A Notified me I was being incriminated for tax evading. I never had any idea of being tax evasive, these people never told me I was being investigated for fraud on the government.

Q I now show you Defendant's A for identification and it is entitled "Memorandum of Interview," it is dated September 16, 1969 covering what purports to be an interview at the Internal Revenue Service at Glens Falls at which you, Mr. --

MR. MUMFORD: Your Honor, if he is testifying from that, I don't believe it is in evidence yet, he is reading from it.

MR. STEINER: I was trying to qualify it.

MR. MUMFORD: If the witness could do that, that would be fine, but I don't believe you can.

THE COURT: He just identifies it and tells

what it is, then offer it and if he has no objection, you really don't need the writings, I am trying to find out if he was advised of his rights.

MR. STEINER: All right.

THE COURT: I don't suppose he knows much about it. This is a copy you had in your possession?

MR. STEINER: Yes, I doubt Mr. Hart is thoroughly familiar with it, he has seen it.

THE COURT: He may not be. Offer it.

MR. STEINER: I will offer it.

THE COURT: I don't know if we need these things in evidence, because the contents are not too important for what we are looking for. We are looking for over-reaching, coercion, failure to warn.

MR. STEINER: Yes. Of course, our purpose of this motion is to suppress it, to kill it, because it is not proper.

THE COURT: I understand that.

MR. STEINER: In a trial such as this that it should --

THE COURT: So it won't make any difference what is in it, that is the end of it. You have to find the reasons to kill it.

MR. STEINER: Yes. I offer it in evidence if the court please.

MR. MUMFORD: I have no objection.

THE COURT: Received.

MR. MUMFORD: It is a photostatic copy. If the court or anybody has trouble reading it, I have the original.

THE COURT: I will receive the copy.

(Defendant's Exhibit A for identification was marked in evidence.)

BY MR. STEINER:

Q Mr. Hart, I show you Defendant's Exhibit A in evidence, ask you to look at it and tell us what it is.

A That is a copy of a conversation I had with Mr. Smith.

Q And what happened primarily at that conference so far as you are concerned, your constitutional rights are concerned?

A Well, I didn't know nothing about what they was talking about, to tell the truth about it, I signed, according to him -- I mean what he was talking to me about, about all this stuff, he never advised me at one time that I was up for defrauding the government or get a lawyer or something like this. Of course, I had never been through this in my life before, didn't know nothing about it, so I gave this man everything he asked me for because I never had a lawyer. The only time I had a lawyer is when I got the

letter.

Q Before the conversation started and before you said a thing, before you wrote your name, was any advice given to you either by Mr. Smith, the tax technician, or Mr. Duchna, the special agent?

A Well, I can't remember what he said, that's all I remember is bringing the papers up there and then they told me one time that he was a cop and he could arrest me.

THE COURT: Who told you that?

THE WITNESS: Mr. Duchna.

BY MR. STEINER:

Q And --

A (Interrupting) I guess he is, he showed me a badge.

Q Did they ask you any questions at that interview?

A That interview there is the time I think we went down all through the checks, he had a list of the checks on every month and we went down through, asked if it was business or personal and I answered all his questions.

Q Before you said anything or before you produced any checks or records, books of any sort, were you told by Mr. Duchna or Mr. Smith that you had a right to counsel?

A No, I didn't tell him, I didn't say nothing.

Q Were you told that whatever was said or whatever was offered by you might tend to incriminate you and that there was no obligation on your part to produce such records or to make any answers to questions?

A He never said such a thing to me in my life. All he done was ask me for my books and papers and "I need this year and that year." He went down to my safe deposit box, he said "If you don't let me go through, I can get a warrant."

Q What kind of a warrant?

A A search warrant.

THE COURT: Was that later he went down and looked in your box, that didn't happen that day, did it?

THE WITNESS: I think that was the day or a couple of days afterwards -- what date is that, that is '71?

BY MR. STEINER:

Q No, this is '69, three years before you got the letter.

A He went through the safe deposit box a couple of years after that.

Q During that interview, were you told that you could rely on the Fourth, Fifth and Sixth Amendments or anyone of those of the United States Constitution and remain silent and refuse to produce your books and

records?

A No, he never said such stuff to me in my life.

Q When you say "He," to whom are you now referring?

A Mr. Duchna, me and him is the ones done the talking, he never said such a thing to me in his life and I never had no subpoena for my books either.

Q Mr. Hart, tell the court the nature and extent of your formal education.

A Sixth grade in school, I got out of school and I went to work when I was 13 years old.

Q And where did you wind up working?

A Well, quite a few places, but during the war I worked in the locomotive from '39 to '46.

Q Was that the American Locomotive Company in Schenectady?

A I was a spray painter.

Q And you say you got as far as the sixth grade in school?

A Yes.

Q Your folks had a large family?

A Oh yes.

Q You had to go to work?

A I sure did.

Q And you did go to work?

A I sure did.

Q Have you ever been in trouble with the [illegible]?

A Never.

Q With anybody?

A Nobody.

Q Ever been arrested?

A No, I have not.

Q Of course you have never been convicted of any crime?

A No sir.

Q Now then, you were asked, were you not, whether you kept any cash on hand at this interview of September 16, 1969?

A The only cash I kept on hand was to start my business off with in the daytime.

THE COURT: What was your business at that time?

THE WITNESS: I am in a bar and restaurant business.

BY MR. STEINER:

Q That is known --

A (Interrupting) Hart's Cafe.

Q Where is it located?

A 74 Hudson Avenue, Glens Falls.

Q It is essentially a restaurant, is it not?

A Yes.

Q But you do serve alcoholic beverages?

A Yes, regular restaurant and cocktails.

Q Were you asked at that time whether you had savings accounts?

A Well now, I don't know if it was that time or not, I know I was asked whether I had savings accounts and bank accounts and everything like that.

Q Before you made any answers to those questions, were you advised of your rights against self-incrimination?

A No.

Q During that time and all through this, were you advised even once that you were under investigation for criminal fraud?

A No, I never was, no sir, if I was, I would have had a lawyer. My understanding was it was just an investigation, that's all, that's all I thought it was.

Q You were told that if you owed any tax, you would have to pay it, if the government owed you any tax, they would have to pay you?

A Mr. Duchna said that to me the last, "We either owe you or you owe us."

THE COURT: Who told you that?

THE WITNESS: Mr. Duchna.

MR. MUMFORD: Did we establish when that was?

THE WITNESS: That happened the last day, I think it was in '71 or '72, or the '70's somewheres.

Mr. Smith was present

BY MR. STEINER.

Q I now show you Defendant's A in evidence, ask you to look at paragraph 15 and tell the court whether it refreshes your recollection as to the questions then being asked you?

MR. MUMFORD: We established he has no present recollection at this point.

THE WITNESS: Yes, I can do that

BY MR. STEINER:

Q Will you?

THE COURT: Well, formally, you are supposed to go through that exhaustion procedure.

MR. STEINER: Even on this type?

THE COURT: No, it is up to yourself.

BY MR. STEINER:

Q Mr. Hart, can you recall definitely, realizing that you are under oath, exactly what questions were asked you and what answers you gave at the interview of September 16, 1969 covered by defendants A in evidence?

A Glens Falls?

Q Yes.

A '69? I don't know.

THE COURT: No, I will let you point it out, 15, is it?

THE WITNESS: Yes, I know.

BY MR. STEINER:

Q Paragraph 15.

THE COURT: All right, read 15 to yourself.

MR. STEINER: I thought we would shorten it by giving the court the nature of the question.

BY MR. STEINER:

Q Were you asked, Mr. Hart, whether you had a safe deposit box?

A Yes.

Q And what did you tell Mr. Buchna and Mr. Smith?

A I told them yes. Then he told us, he says "Now we get to look through that. Now if you don't give us the right to look through it, why I can get a search warrant."

THE COURT: Did you say you wouldn't let him look through it first?

THE WITNESS: No, I signed the receipt so he could go through it.

THE COURT: So did he ask you if he could see it?

THE WITNESS: Yes, he went down, he was down there about two hours, took the name of every war bond we had there and counted all the cash we had there, I think we had $1,500 or $2,000, I can't

remember which, which my wife had been saving fifteen years.

BY MR. STEINER:

Q Was it your cash that they counted?

A That was my wife's cash.

Q How had she acquired this cash?

A Saved say in the last 18, 20 years, a little bit at a time. We had a robbery over to our house, they stole the safe and all right out of the house, everything out of the house that one time, and we had a lot of records and stuff, so she says "I am going to rent a safe deposit box and put it in that." We finally got our bonds back, our bonds were all stolen and we got those back.

Q When had you acquired the bonds?

A A lot of those bonds I got when I worked in the locomotive.

Q They were $25 bonds?

A Yes.

Q War savings bonds?

A Yes.

Q There might be other denominations?

A Yes.

Q Who had the keys to the safe deposit box?

A My wife had the keys.

Q And they were produced, the key was produced?
A Yes.
Q Were you present when the safe deposit box was opened?
A Yes.
Q And who was present when the safe deposit box was opened?
A My wife and Mr. Duchna and I don't know if that is the right name, and Mr. Smith and myself.
Q Had you been cautioned, told by either Mr. Duchna or Mr. Smith that you didn't have to produce the safe deposit box or its contents?
A No.
Q And you testified that one of them said that if you didn't produce it, we will get a search warrant?
A That's right.
Q All through this you hadn't been cautioned that you were under criminal investigation?
A Not at one time, no sir.

MR. STEINER: If the court please, this may be an appropriate time to move to suppress.

THE COURT: Well, at least I've got to hear the other side, they have a right to cross examine this man. I just can't accept everything he says without the government cross examining.

MR. STEINER: Well, I am wrong.

(A document marked Defendant's Exhibit C for identification.)

THE COURT: How long are you in the restaurant business?

THE WITNESS: 26 years.

THE COURT: When did you start?

THE WITNESS: Started 1946.

THE COURT: All right.

THE WITNESS: I built my own bar when I first started.

MR. STEINER: Your Honor, I don't want to run out of bounds, ordinarily I would show this to the witness and ask him to identify an offer for identification. However, I might shorten this by showing this now to the U. S. Attorney, he may consent that it go in evidence.

THE COURT: You should state for the record what it is generally.

MR. STEINER: Yes. This is a memorandum, Your Honor, made by the special agent as a result of the examination of the defendant's safe deposit box in the First National Bank of Glens Falls on the same afternoon, on the afternoon of the same day that Defendant's A was taken.

THE COURT: That is September 16, 1969?

MR. STEINER: Yes, Your Honor.

THE COURT: I was just wondering, Mr. Steiner, how many of these exhibits are we going to go through, are we going to go through exhibits for all your motions? We will be here several days, the way I view it. I don't want to short-cut anything.

MR. STEINER: They are all of the same nature, none could possibly go into evidence. They would all be grounds for --

THE COURT: How would this memorandum be involved in any circumstances in which he was present. This is a memorandum the agent made afterwards.

MR. STEINER: It refers to evidence obtained surreptitiously from this defendant without indicating that he was under criminal investigation, that he didn't have to produce any of this, he doesn't have to open his mouth.

THE COURT: But this is an aftermath, this is what the agent made after these incidents.

MR. STEINER: Well, even either then or simultaneously, it is entitled, if the court please, "Memorandum of Interview" and then below that In re Harry F. Hart and Frances E. Hart.

THE COURT: I understand, I have seen a lot of those, this is a memorandum made by the agent. He

wasn't with this defendant when he made that. This is information he obtained from the investigation and he marked down his memorandum of it.

MR. STEINER: And it is signed, if the court please, by Joseph A. Ducnna, special agent.

THE COURT: I understand that, it is not signed by Harry Hart, it has nothing to do with him, that memorandum.

MR. STEINER: It is not admissible in evidence, it is suppressible. May I show it to you?

THE COURT: I know what it is.

MR. STEINER: And it was made, evidently it says time and place September 16, 1969, 1:00 p.m. -- 2:40 p.m. It took an hour and forty minutes. It was made at the First National Bank of Glens Falls. It certainly should be stricken, it has no place in this case. We weren't able to get it, we didn't get it.

THE COURT: You are not in the case yet, and I don't know whether that is going to be offered.

MR. STEINER: I will now offer it.

THE COURT: Mr. Mumford?

MR. MUMFORD: I don't know whether the purpose of Mr. Steiner's offer is to put this memorandum per se before the court to have it suppressed.

THE COURT: That seems to be his idea, so I will receive it.

MR. MUMFORD: I don't believe that this memorandum is something that the government can offer in evidence at the trial anyway.

THE COURT: That is the point, it could not come into evidence.

MR. MUMFORD: This memorandum was made, it is the agent's recollection of what transpired at this.

THE COURT: That is what was in my mind, we are going to strike something that wouldn't come into evidence at the trial.

MR. STEINER: The jury will hear this.

THE COURT: They won't hear that memorandum read to them because I won't allow it.

MR. STEINER: But it will have a very damaging effect, it contains information that would ordinarily accuse this man here of having accumulated --

THE COURT: Mr. Steiner, how is it going to get into the trial? It is a memorandum of an agent. Unless it is used to refresh his memory, otherwise it is incompetent.

MR. STEINER: The Jencks Act, of course,

permits us to --

THE COURT: Cross examine.

MR. STEINER: Suppress all these.

THE COURT: You can use it to cross examine the agent and contradict him, but we are looking for what the government is going to use, not what you are going to use, that is the point.

MR. STEINER: The government has obtained all of this surreptitiously, it is damaging.

THE COURT: We are to suppress things that may come forth in evidence. If they don't come forth, it makes no difference, it won't come into the trial, so we are striking things --

MR. STEINER: It is part of the record of the United States Attorney.

THE COURT: Well, I expressed my viewpoint and I am clear on what I am doing, I have done it often.

MR. STEINER: I appreciate it is not necessary that I take an exception, but to the end I think this is important that --

THE COURT: No, I will give you an exception, you can have it. Let's proceed, otherwise we would take each document, it is going to be very lengthy here.

MR. STEINER: I now move, Your Honor, to suppress paragraphs 15, 16 and 20 of Defendant's Exhibit A in evidence.

THE COURT: Motion denied, it is not the proper time to so move. The Government has a right to present its side I would think in this hearing. You can renew your motion at the appropriate time and then I will rule upon it.

(A document marked Defendant's Exhibit D for identification.)

MR. MUMFORD: I have no objection to defendant's Exhibit D.

THE COURT: Received.

(Defendant's Exhibit D for identification was marked in evidence.)

BY MR. STEINER:

Q Mr. Hart, I now show you Defendant's D in evidence and ask you to look at it, tell us whether you attended, to the best of your recollection, a conference on October 21, 1969, 1:00 p.m., at the Internal Revenue Office in Glens Falls?

A I must have, I can't remember these things. October 21?

Q And who was present at that interview?

A Mr. Smith and Mr. Duchna.

Q And the first paragraph refers to cash register tapes from the bar and food which were personally entered in the receipt books, what questions were asked you with reference to the cash register tapes?

A He asked me if I had the tapes, which I didn't.

Q Why didn't you have the cash register tapes?

A We had a bunch of papers down in the cellar, and we had a little fire and I had to throw them away.

Q Who told you to throw them away?

A The fire inspector.

Q What did he say to you?

A To get this stuff out of the cellar, it is a fire hazard.

Q And did you do just that?

A It was over three years old, so I figured they wasn't any good anyway. Now they tell me you have to keep them for six years, which I didn't know, I thought three years you could throw that stuff away.

Q Were you asked questions by Mr. Duchna with reference to deposits in your checking account?

A Oh yes, he asked me about all the checking accounts and the deposits and I had to get all our bank deposits for him and our checks, all our cancelled checks and all our books.

Q And what about the bank statements?

A The bank statements too.

Q It was a big box of papers, was it not?

A Yes.

Q What, if anything, was told to you by Mr. Duchna or Mr. Smith or both at this time with reference to turning over all of these checks, bank statements, deposit slips, all the records?

A I turned them all over and I signed a receipt.

Q Prior to turning them over, what,if anything, was said to you?

A Nothing.

Q Were you told that you were under criminal investigation?

A No, I was never told that at anytime.

Q Were you told that you had a right to counsel?

A No, I can't remember that. I know I signed a receipt for him to take all of my material.

Q Were you told that you didn't have to turn them over?

A No.

Q Were you told that they could be used against you?

A No.

Q Who took all these records and checks and bank statements?

A Mr. Smith and Mr. Duchna, and Mr. Smith came back to my house and got some -- come up to my house and I

hunted up some more and gave it to them. They took it from my home. We signed a receipt then.

Q A time came, did there not, Mr. Hart, when you and Tom Guthrey of my staff, your good wife and I made a thorough investigation of your premises looking for the checks, the bank statements and your records?

A Yes.

Q What happened during that search that we made?

A We couldn't find them.

Q Were they later found?

A Yes.

Q Who found them?

A Mr. Steiner.

Q And where did I find them?

A Down in the Revenue office, I guess.

THE COURT: Do you know where they were all that time?

THE WITNESS: No, I thought he had them all, then according to this --

THE COURT: Weren't you there when you turned over the tapes and everything?

THE WITNESS: Yes, I turned them all over to Mr. Duchna.

THE COURT: Didn't you know he had them?

THE WITNESS: I thought he had them, but

Mr. Steiner called him up and he said he didn't have them.

MR. STEINER: No, he said he did have them but a long period had elapsed and the witness's memory --

THE COURT: I wasn't clear, but at least he is not saying that he didn't know where they were.

MR. STEINER: He didn't know. We spent a lot of time looking for them. He had forgotten that the agent had ever taken them.

THE COURT: Well, had you forgotten the agents took them?

THE WITNESS: Yes, I didn't know he had them all.

THE COURT: Did you know what he took?

THE WITNESS: Let me see --

THE COURT: I mean, did you have a receipt, the way I understand it?

THE WITNESS: Yes, he took '65, '66, '67, '68 -- was it '69, too, I think it was, I don't know if he took '69 or not.

THE COURT: All right.

THE WITNESS: I know he had everything.

THE COURT: You knew he had them?

THE WITNESS: Oh yes.

BY MR. [illegible]:

Q You know that he took them, now when we were at your premises --

(Interrupting) When you was hunting for something else you couldn't find them, and we didn't know this man had them.

Q Weren't we hunting for bank statements, the checks, everything for 1966, '67 and '68?

A Right.

Q Did you know when we were making this extensive search that Mr. Duchna had them?

A No, I thought he give them back to me, which he gave me some stuff back, I thought I had them back, which he give me a lot of stuff back, which I had down in the cellar, and I didn't have that, but I didn't know he had them.

Q Now once before Mr. Duchna took these records, what caution, if any, did he give you with reference to your obligation, if any, to turn them over?

A He never told me I was being investigated for a crime or anything, no, he never done that.

THE COURT: Did he ask for your records at one time?

THE WITNESS: Yes.

THE COURT: And what did you say to him?

THE WITNESS: I give them to him.

THE COURT: All right.

THE WITNESS: I give him everything he asked for, him and Mr. Smith.

BY MR. STEINER:

Q And was there anything said at that time about a search warrant or a subpoena?

A When he wanted to go through the safe deposit box, he said --

THE COURT: No, at this time when he took all the records out of your cellar, wherever it was.

THE WITNESS: No, I got them all together for him and I gave them to him freely, and he signed a receipt, sent the receipt, I guess.

BY MR. STEINER:

Q I ask you once more, were you then cautioned of your constitutional rights against self-incrimination?

A No, nothing about incrimination or nothing.

THE COURT: Well, I think his testimony is going to be throughout this whole investigation he was never told about incrimination, is that right?

THE WITNESS: That's right.

THE COURT: So we can take a blanket statement along that line.

MR. STEINER: And not until July 3, 1972 and

roughly three years after this had all started did he learn for the first time that he was under criminal investigation.

THE COURT: All right, I will accept that for all of it, that will shorten it.

MR. STEINER: Yes. May I have this marked.

(Document marked Defendant's Exhibit I for identification.)

THE COURT: Mr. Mumford, I think you should get up and state your position, I don't know why we are doing this.

MR. MUMFORD: This again, Your Honor, is another memorandum of Mr. Duchna and I am going to object as improper foundation and it is not competent and I think it is also irrelevant to the subject of this hearing.

THE COURT: I agree.

MR. STEINER: It is covered fully by the Jencks Act, not only statements made by this man but any memorandum made by the Internal Revenue Service is admissible, is relevant.

THE COURT: Mr. Steiner, let's settle down here, because a memorandum is not anything signed by this man, this is by an agent and the government can't introduce that in evidence. You can use it to

contradict the evidence of the agent under the Jencks Act, but otherwise these things are meaningless, they are not going to be part of the Government case.

MR. STEINER: Except it will be prejudicial to the defendant.

THE COURT: He will have the memorandum.

MR. STEINER: Then it comes up during a trial, we are trying to suppress it so it can't possibly --

THE COURT: You have to wait for the testimony of the agent who may come on and say he said this to me, then it is objectionable. These are memorandums and in and of themselves are official records that the agents made, they are not a confession.

MR. STEINER: Except that the --

THE COURT: They don't become involved in a suppression hearing. I have never seen them before.

MR. STEINER: Except that the law is so clear today that not only affidavits or statements made by the defendant but --

THE COURT: That is not an affidavit of his, this is a memorandum.

MR. STEINER: It is a report, Your Honor, or any report made by an investigatory agent is suppressible, and this is a report.

THE COURT: Suppressible from evidence. It is not being offered in evidence, that type of memorandum couldn't come in the trial, the government can't introduce it. I don't think you are clear on that.

MR. STEINER: I am clear on that, but what concerns me greatly is when anything of this nature is offered, the jury will hear it.

THE COURT: Who is going to offer it? Are you going to offer it?

MR. STEINER: I certainly won't.

THE COURT: That's the end of it, they can't offer it because it is incompetent.

MR. STEINER: They will refer to it, when they refer to it, I think we have the grounds for a mistrial.

THE COURT: They may if he can't remember and refresh his recollection possibly. I mean I am not clear on what you are doing, and I am very frank to state it.

MR. STEINER: The heart of this case refers to a payroll that was paid in cash out of the register, that is the crux of the whole case. Now this memorandum that I have in paragraph 1 says the net payroll is paid out in currency the latter part of the week, the social security taxes and so on, and

then it goes on to say --

THE COURT: That is what that agent wrote down, but I can't receive that in evidence and say that is it. Don't you understand? He has to get on and testify about it.

MR. STEINER: But when Mr. Duchna takes the stand, and I am confident he will be put on the stand by the People --

THE COURT: I am sure he will.

MR. STEINER: All this will come out, and we are trying so hard now to suppress it.

THE COURT: I understand you are trying hard, but this memorandum in and of itself is not an item of suppression.

MR. STEINER: But he obtained it surreptitiously without cautioning him.

THE COURT: He didn't obtain that memorandum surreptitiously, he sat down and made out some notes.

MR. STEINER: He obtained the information upon which this memorandum is based, he did it illegally, improperly and anything that is related to that is suppressible under the Jencks Act.

THE COURT: Well, I don't know. I don't understand. I sustain the objection.

MR. STEINER: Exception.

(Document marked Defendant's Exhibit F for identification.)

MR. STEINER: I will offer this.

MR. MUMFORD: Objection, no foundation layed, incompetent.

THE COURT: What is that?

MR. STEINER: This is a memorandum entitled, "Memorandum," Your Honor, In re Hart and so on, it is dated January 16, 1970, three years before.

THE COURT: All right, made by an agent?

MR. STEINER: Made by two agents, Joseph A. Duchna, the special agent, and David T. Smith.

THE COURT: All right, I sustain the objection, it doesn't belong in this proceeding, and I am trying hard to convince you that that is my feeling about it. The Jencks Act is for the advantage of the defense, to get these statements so they can contradict the agent, title 18, section 3500, that is the benefit of it. It is not for the Government to be able to introduce all the memos of the agent, otherwise you wouldn't even need a trial.

MR. STEINER: That is how they got them, and the moment they go in and having obtained it improperly --

THE COURT: These are their notes, and their

notes are not admissible only in certain circumstances during a trial. We are not at that stage yet. Am I making myself clear?

MR. STEINER: I understand Your Honor's comments.

THE COURT: These are for suppression that is seized, something unlawfully obtained, failure to deliver miranda warnings.

MR. STEINER: This memorandum states, one, the ledger sheets pertaining to the year 1969 --

MR. MUMFORD: He is reading from something that is not in evidence.

THE COURT: I will let him read it, what difference does it make, I am not going to allow that in evidence.

MR. STEINER: What about the ledger sheets that were obtained?

THE COURT: They are not here, those are the things that will come on during the trial. If I think they are fairly authenticated and authoritative, I will receive them. We are not here to dig through all the memorandums of the agent and say this one is wrong.

MR. STEINER: Then will Your Honor direct the U. S. Attorney to turn over to the defendant all

statements made by any party that are relevant to this prosecution?

THE COURT: I thought you already had them, you have all these?

MR. STEINER: All that we got, Your Honor, are the very things that you are refusing to receive in evidence, they are photostatic copies of memoranda. We also got, and I will come to those, we got three affidavits of an accountant, Edward Bottom, the photostats that were delivered to us were memoranda with the exception of certain affidavits, two affidavits, three affidavits of Harry Hart which, of course, I will come to. I have been trying to do that chronologically.

THE COURT: Well, my ruling is going to be the same as far as any memorandum of any agents, they are not involved in this suppression hearing at all.

MR. STEINER: All right. Now then --

THE COURT: That is my ruling, if I am wrong, I am wrong, but I don't think I am.

MR. STEINER: I never had it presented in this fashion. There is no misunderstanding on my part. I respectfully take an exception to Your Honor's ruling. I renew my motion, the motion that was made perhaps three weeks ago to require the U. S. Attorney

to turn over to me all statements relevant to -- all statements and affidavits and reports relevant to this prosecution. We know that certain --

THE COURT: Did you make a motion three weeks ago? I have forgotten.

MR. MUMFORD: Your Honor, you denied the motion.

THE COURT: Did you make a motion three weeks ago?

MR. STEINER: We made three motions.

THE COURT: Did I rule on those motions?

MR. STEINER: You ruled two were untimely and the third was for suppression.

THE COURT: That's right, and I deferred that until today.

MR. STEINER: That's correct.

THE COURT: All right. So the rulings that I made in the other two stand, they were untimely, they were made long after the indictment, long after the arraignment.

MR. STEINER: Yes, that's correct, Your Honor, but the U. S. Attorney has not turned over to us all of the affidavits or statements, we don't know what they are, we haven't seen them that are relevant to this prosecution.

THE COURT: Well, my ruling, if it was in your motion previously, I rule it untimely and that stands and they don't have to turn it over unless they desire to. I am sure they furnished you much here, haven't they? I don't want any feeling here that they haven't cooperated and furnished you the things that you are legally entitled to.

MR. STEINER: This witness here --

THE COURT: I am talking to you, Mr. Steiner.

MR. STEINER: I am dead sure that Mr Mumford will never say that I haven't cooperated one hundred percent with the Government, nor will any U. S. Attorney ever make that remark.

THE COURT: Will you say that Mr. Mumford hasn't cooperated and been fair with you?

MR. STEINER: I think this, that there are affidavits or statements in his file that are relevant to this prosecution that have not been turned over to us, and we are entitled to them.

THE COURT: I don't know what they are.

MR. STEINER: I haven't seen the contents of his file, but I know it is very voluminous.

THE COURT: All right, Mr. Mumford, how much of your file have you shown him? State your position here.

MR. MUMFORD: We requested the court reporter to take down all the minutes and it very clearly shows then during the course of the discussion at that meeting that although you denied the motions for discovery because they were not timely made, that with the exception of one demand made for discovery and inspection, and there are seven of them made, with the exception of one we complied one hundred percent, and the one exception that we did not comply with was No. 5, where a transcript of minutes of all testimony of witnesses who testified before the Grand Jury was requested.

THE COURT: All right, so you are not entitled to that without question.

MR. MUMFORD: Other than that we gave them everything they demanded, and I think more than they demanded.

THE COURT: I want you to speak your side.

MR. STEINER: We are sure of this, Your Honor, that certain persons have been subpoenaed, this I am not sure of, that they made statements or affidavits, averred to certain affidavits.

THE COURT: We are not here for discovery now, I have ruled on that that it was untimely, you were given the advantage of the Government voluntarily

giving you a lot of information. We are over that, we are on a suppression motion, we have two of them here now and they are not too difficult, suppression motions we have them all the time, this one is becoming quite involved.

MR. STEINER: I would say they are very important, especially in a criminal case.

THE COURT: They are not involved at all, I have had many of them, I am going to let you put your side in on the issue that you have here, put it in completely, but I didn't let you put in things that are meaningless.

MR. STEINER: My only objection is, and the court has held very clearly, that when put in during a trial, it is prejudicial to the defendant, because the jury hears it and irrespective of Your Honor's ruling --

THE COURT: Well, that wouldn't relate to -- that would relate to confessions, that doesn't relate to memoranda made by agents at all, I mean I am not going to discuss it too much longer, it is elementary that it doesn't.

(A document marked Defendant's Exhibit G for identification.)

BY MR. STEINER:

Q Mr. Hart, I now show you a paper marked Defendant's Exhibit G, ask you if this is your signature, what purports to be your signature on a photostatic copy.

A Yes.

THE COURT: What is the date on that?

BY MR. STEINER:

Q Did you subscribe and swear to this on January 12, 1972?

A I don't know, he told me where to sign it, I didn't read it over or anything, he read it off to me, what he wrote up here, and then I just signed it.

Q Who was present during that when you made these averrments?

A Mr. Smith and Mr. Duchna.

Q And where was the hearing held?

A In Glens Falls.

Q Internal Revenue?

A Yes.

MR. STEINER: I am going to offer this in evidence.

MR. MUMFORD: No objection.

THE COURT: Received.

(Defendant's Exhibit G for identification was marked in evidence.)

BY MR. STEINER:

Q Mr. Hart, I show you Defendant's G in evidence, ask you if this was your affidavit made on January 12, 1972?

A Yes.

Q Before you made that affidavit, what cautionary advice was given to you either by Mr. Duchna or Mr. Smith?

A None, just asked me the questions on there and I answered them, and after they got through writing it down, I read it over and he said, "Sign it right there." He read over what he wrote down and then he told me where to sign it and I signed it.

THE COURT: They didn't give you any warnings of any kind?

THE WITNESS: No, he just read what he wrote.

THE COURT: That is the type of thing that might be involved here, that is different from the memorandum of an agent, that is the point.

MR. STEINER: It is more than a memorandum, Your Honor, this is an affidavit.

THE COURT: I realize that, the distinction between that and an agent's memorandum, he signed it, it may be used against, him, I don't know.

(A document marked Defendant's Exhibit H for identification.)

BY MR. STEINER:

Q I will qualify this and then offer it in evidence, if the court please. Mr. Hart, I show you a paper which purports to be Defendant's H for identification, ask you if this is a facsimile of your signature?

A Yes, these are the stuff he wrote down, he read it out to me and then said, "Sign it here."

Q Will you look at the paper and tell us when you verified it?

A May 25, 1972.

Q And before whom did you subscribe and swear to it?

A Duchna and Mr. Smith.

Q Prior to the making of these averments contained in this exhibit, were you cautioned of your rights under the Fourth, Fifth and Sixth Amendments?

A No, except he read off what he wrote down and I signed it.

MR. STEINER: I offer this.

MR. MUMFORD: I have no objection.

THE COURT: Received.

(Defendant's Exhibit H for identification was marked in evidence.)

THE COURT: Do you have a lot of those affidavits that were taken from him?

MR. STEINER: This is the third one, Your

Honor, then I have three affidavits of his accountant, Howard B. Bottom.

THE COURT: I am trying to get together everything he signed, those are important to the suppression hearing, if he signed affidavits or confessions, anything that might incriminate him, of course that is important.

MR. STEINER: Sure.

THE COURT: But do you have any more of those, we will put them all in?

MR. STEINER: This is the third one of his.

THE COURT: Are there any more of those?

MR. STEINER: Not that we know of.

THE COURT: All right.

MR. STEINER: There may be some, I am certain that Mr. Mumford wouldn't have held them out improperly.

THE COURT: I don't think he would either.

MR. STEINER: I am dead sure, I am sure he wouldn't.

BY MR. STEINER:

Q Mr. Hart, I now show you a paper marked Defendant's Exhibit I for identification and ask you what it is.

A Well, this is the stuff he wrote down and marked all the numbers down, the bonds, and I said --

THE COURT: What date is this?

MR. STEINER: June 1, 1972.

THE COURT: All right.

THE WITNESS: Mr. Duchna and Mr. Smith.

THE COURT: O.K.

BY MR. STEINER:

Q Prior to signing it, were you advised of your constitutional rights?

A No, he just give me the paper and it was written on there, he read me what was on the paper, what he wrote down, and then he says, "Sign it here," so I signed it there.

Q And he read to you what he had written?

A Yes.

Q Did he read the fine print?

A No -- what do you mean fine print?

MR. STEINER: I offer this?

THE WITNESS: No fine print was read except what he wrote on the document there, then he showed me where to sign it and I signed it.

MR. MUMFORD: No objection.

THE COURT: Received

(Defendant's Exhibit I was marked in evidence.)

BY MR. STEINER:

Q One other question, did he ask you whether you swore to this?

A I don't remember if he did or not.

(Document marked Defendant's Exhibit J for identification.)

THE COURT: Do you have affidavits of agents now?

MR. STEINER: No, I have -- these are -- I have two affidavits right here, I have what could very well be a third affidavit, but the photostat doesn't show the signatures. I feel very strongly that the originals -- Mr. Mumford I imagine has the originals right there, we will see in a moment whether --

THE COURT: What I am trying to get at, I am going to allow any affidavits or things that he may have signed, but I am not going to allow anything signed by agents, the same as the memorandum, so I better let it be known to you that I don't think that they are applicable here. If agents signed affidavits they signed affidavits.

MR. STEINER: This is not an affidavit, Your Honor, of agents, it is what purports to be, and it is entitled "Affidavit," however, there is no legible signature of the deponent on there.

THE COURT: Is there anything that your defendant here signed?

MR. STEINER: No.

THE COURT: Did he sign it?

MR. STEINER: No, but his accountant may have signed it. I am confident his accountant signed the other two that I am holding in my left hand, as to this one --

THE COURT: Well, in the trial they can't put the affidavits of the accountant in evidence, the Government, unless I am dead wrong, I have never seen it.

MR. STEINER: They may refer to them, that is the danger. I would like to suppress them.

THE COURT: You might as well mark all that type of and we will get them all in together, affidavits of other people other than this defendant.

(Documents marked Defendant's Exhibits K and L for identification.)

MR. STEINER: I might say this, I am right to the very end of this now.

THE COURT: We did estimate a couple of hours, and it looks like we might be here much longer, isn't that what we thought this morning?

MR. STEINER: Something like that, yes, my

end hopefully will be finished within the next five minutes.

THE COURT: All right.

BY MR. STEINER:

Q Mr. Hart, I show you what purports to be three affidavits made by Edward B. Bottom, ask you to look at them and tell the court who the deponent was or is?

A These are Mr. Bottom's.

Q Who is Mr. Bottom?

A Edward Bottom, he is my accountant, they are all signed by him.

MR. STEINER: I offer these.

MR. MUMFORD: I object to them, Your Honor, best evidence rule, photostatic copies, and there has been no proper foundation, incompetent.

THE COURT: Sustained.

MR. MUMFORD: Also irrelevant to this hearing.

THE COURT: Sustained on the ground of irrelevancy to this hearing.

MR. STEINER: Your Honor directed the U. S. Attorney to turn over these papers, and the U. S. Attorney agreed to turn them over. Now an objection is being taken that they are nothing but photostats.

THE COURT: They don't belong in this

suppression hearing, in my judgment by the farthest stretch of the imagination, so I sustain the objection because they can't offer the affidavits of his accountant's against him, as far as I know they can't.

MR. STEINER: No, but when they put the accountant on, and we know he has been subpoenaed, they are going to refer to these affidavits. There isn't the slightest doubt about it, this jury will hear that and that will be prejudicial to the defendant.

THE COURT: That is not grounds for suppression under rule 41-E.

MR. STEINER: That is why we are here.

THE COURT: I say it is not. I don't follow that at all. I sustain the objection.

MR. STEINER: I think Your Honor will agree that they are relevant to this prosecution.

THE COURT: They may be used in some type of a contradictory manner, if that comes to pass, I don't know whether it is going to come to pass, but it is nothing that this defendant signed and he has standing to say I want that suppressed. I think it may never come in the trial, those things, I don't know, like the Jencks Act material, it is used to contradict, that is the only purpose of the Jencks Act

is to give you, the defendant, privileges that he didn't have before, to take the agent's statement and say "You said this when you made that statement, now you are on the stand saying that." It is pretty simple, I think.

MR. STEINER: May I have an exception?

THE COURT: Yes sir.

MR. STEINER: Nothing further, Your Honor, on this motion.

THE COURT: That is, you rest completely?

MR. STEINER: Yes.

THE COURT: All right. I assume, Mr. Mumford, before we take the defendant resting, you have a right to examine this witness.

MR. MUMFORD: I would appreciate that opportunity, please, Your Honor.

CROSS EXAMINATION

BY MR. MUMFORD:

Q Mr. Hart, do you recall when Mr. Smith, approximately when Mr. Smith came to see you the first time?

A No, I really can't remember what date it was.

Q Would it be fair to say it was sometime around the first part of 1969?

A It could possibly have been, I really don't know for sure, that is quite a few years back.

Q And when you met with Mr. Smith, did he ever show you, mention a badge, you mentioned a badge, did he ever show you a badge or anything of that nature?

A Mr. Smith never did, no sir.

Q And when Mr. Smith first met with you, did he ever give you any of these constitutional rights or warnings that we have been talking about?

A Mr. Smith never did, no.

Q Now about how many meetings would you say you had with Mr. Smith before he introduced you to Mr. Duchna?

A I can't remember whether it is one or two, but I know one time he sent us a letter --

Q (Interrupting) Now who is "he"?

A Mr. Smith sent us a letter to sign and give up these.

Q We will get to that, just one at a time. You had about how many meetings would you say with Mr. Smith before you met Mr. Duchna?

A I'd say two or three, I really don't remember.

Q Could it have been as many as five or six?

A No.

Q And about how long did you meet, over what period of time did you meet with Mr. Smith before you met Mr. Duchna?

A I don't understand your question.

Q Well, I will withdraw that question. You met Mr.

Duchna when, in what month, do you recall?

No, I think it was probably two or three months after, it could have been less than that, I can't say for sure.

Q I believe when Mr. Steiner was asking you some questions, you said you met Mr. Duchna about one month after Smith, that isn't correct?

A That could have been, one or two weeks afterwards, yes.

Q You met Mr. Smith around January of '69?

A I believe that's correct.

Q All right, and isn't it true you met Mr. Duchna in September of '69?

A September '69?

Q Yes.

A No, I don't know, I can't say.

Q O.K., you don't recall.

A No, I don't.

Q Mr. Hart, I am going to show you Defendant's Exhibit A in evidence and ask you if you will just look at that and see if that refreshes your recollection as to when it is you first met Mr. Duchna?

MR. STEINER: I object, Your Honor, there is nothing in that exhibit that indicates it was the first time that the witness met with Mr. Duchna or Mr. Smith.

THE COURT: Wait a minute, let him look at it, if it doesn't refresh him, he can tell us.

Does that help you out?

THE WITNESS: All it says on here is September 16, 1969.

THE COURT: Well, does that help you to remember when you first met this special agent?

THE WITNESS: No, it don't.

THE COURT: All right.

BY MR. MUMFORD:

Q When you first met with Mr. Duchna, do you recall what you discussed with him?

A Well, I first met with him, he went over the books and stuff with Mr. Smith, then he asked me for some more years of the stuff.

Q Did he ask you basic questions with respect to your background, family background and your business and what have you?

A He asked me all about my business, yes he did.

Q And did you fill him in about when you were born and jobs you had had, and when you married your wife and the children?

A I can't recall if I did or not.

Q Did he ask you basic background questions?

A I can't remember if he did or not, he was getting all

these tax things and the cancelled checks and everything.

Q O.K., fine. Do you recall -- well, did you answer his questions, the ones he put to you at that meeting?

A Yes I did, I think I did.

Q You cooperated with him fully?

A Everything he wanted.

Q Would it be fair to say it was a fairly friendly meeting?

A I thought we had all good friendly meetings.

Q You never had any problem with Mr. Smith or Mr. Duchna, did you?

A No, I never had any arguments.

Q No one ever raised their voice or anything?

A No.

Q You never felt threatened when you were in their presance, did you?

MR. STEINER: I object to the question, Your Honor. I have no objection if he states what Mr. Duchna said, but I object to the word "threatened," it is vague.

THE COURT: That is your objection. Do you persist in your question?

BY MR. MUMFORD:

Q No, I will withdraw it, Your Honor. Now at this first

meeting did you give over or turn over any box to Mr. Duchna?

A Well before that, I already turned a lot of stuff over to Mr. Smith, now the first meeting I don't know whether I turned anything over to Mr. Duchna or not.

Q Where did you meet with Mr. Duchna?

A Up in Glens Falls, the revenue office in Glens Falls.

Q And you met with Mr. Duchna, did he show you a badge?

A He showed me his credentials and he had a badge.

Q When he showed you his badge, did he explain to you, Mr. Hart, that he was with the Intelligence Division of Internal Revenue Service?

A Yes.

Q And did he tell you that the purpose of the Intelligence Division was to look into possible fraud in income tax cases?

A He never said anything about fraud, no sir.

Q Did he at any time read to you from any card anything about your rights?

A Well, he said I could have a lawyer and I said I didn't think I needed any lawyers because I didn't do anything wrong.

THE COURT: He said you could have a lawyer?

THE WITNESS: I am pretty sure he said something about a lawyer, and I said no, I didn't think

I needed a lawyer, I will give you anything you want, I didn't think I did anything wrong.

BY MR. MUMFORD:

Q All right, did he tell you, you didn't have to answer his questions if you didn't want to, it was up to you?

A No.

Q Did he tell you that his function was to investigate possibility of criminal violations of the law?

A He never said anything about criminal violations of the law, not to me.

Q Did Mr. Duchna ever mention to you that you didn't have to answer questions if you didn't want to?

A Well, I can't -- no, I can't remember that he did or not, but I don't think -- I always answered every question he asked me, I give him everything he wanted. He didn't say, "Well, you don't have to answer this or not," he never did.

Q You knew he was investigating into your taxes, didn't you?

A Yes sir.

Q And that is why he asked you for your books, is that correct?

A Yes.

MR. STEINER: I object to the question, Your Honor, calling for a conclusion as to why he

asked, state of mind.

THE COURT: No, overruled. Cross examination.

BY MR. MUMFORD:

Q That same day that you met with Mr. Duchna, did you go or did you later that day meet him at your bank, sir?

A Not the first day, he went -- he looked down in the bank and around all the people I done business with and found out all about my accounts and everything.

Q Well, did you on a particular day meet with Mr. Duchna and Mr. Smith and your wife and yourself at your bank and go through your safe deposit box?

A Yes, we did one day, but I don't know what day it was.

Q Had you met with Mr. Duchna and Mr. Smith earlier that same day?

A I can't recall if I did or not, unless they called us up, I don't know.

Q Well isn't it a fact, sir, that you called them and told them that they could look through the safe deposit box?

A No, I didn't, no sir, he is the one that asked me.

Q And when he asked you if he could look in the safe deposit box, what was your response?

A Well, I always thought you had a safe deposit box so nobody could look through it, that's why you have them,

he said he could get a search warrant.

Q And did he get a search warrant?

A No.

Q And did you let him look in the box?

A We volunteered to let him look in the box, right, didn't have anything to hide, so why shouldn't I let him look through it?

Q And in whose name was that box?

A I think it is in my wife's name, I know it is.

Q And what was in it?

A Well, it had some --

MR. STEINER: I object, Your Honor, the memorandum made by the agent is the best contents, the best evidence of the contents of what was in that box, and it is wholly immaterial, it is not part of this prosecution. This witness had not been cautioned of his constitutional rights, there was no obligation on his part to produce the contents, and having been obtained surreptitiously, they are not evidence.

MR. MUMFORD: Your Honor, this is a suppression hearing, this is not the trial.

THE COURT: Overruled, you may ask. What was in the box?

THE WITNESS: This gentleman already knows, I already told Mr. Steiner.

THE COURT: Well, tell me. I don't know anything about it.

THE WITNESS: Well, we had war bonds in there.

BY MR. MUMFORD:

Q Whose bonds were those?

A There was bonds of myself and some of my wife's.

Q And those were the ones that you have already testified were in the amounts of $25 each, is that right?

A Some of them $25, some of them more.

Q Were there any for $100?

A Could be some in there for $100, yes.

Q And they belonged to you and your wife?

A Well, no, I think -- I got a lot of them for me that I took out, but they had some cash in there.

Q Whose cash was it?

A About $2,000, $1,500.

Q Was that your wife's or both of yours?

A That was my wife's, I suppose it was mine too.

Q It belonged to both of you?

A Well, she put it in there -- no, that was hers.

Q Did your wife have any independent source of income other than your business?

MR. STEINER: I object on the ground that his wife is not a defendant in this action, wholly

immaterial.

MR. MUMFORD: Joint return, Your Honor.

THE COURT: All right, overruled.

THE WITNESS: What did you say?

BY MR. MUMFORD:

Q Does your wife have any source of income other than your business?

A No, that is my business, she works over there.

Q Does she get paid a salary?

A No.

Q Is there any money drawn out of the business other than the money that you draw out that goes to pay for your wife's employment there or work there?

MR. STEINER: I object on the ground that it is irrelevant, immaterial, not part of this prosecution or of this motion.

THE COURT: It may be part of a trial prosecution, Mr. Mumford, but do we need all these elements on the suppression motion, because here we are merely interested in finding out was he advised of his rights or was there an unlawful search and seizure.

BY MR. MUMFORD:

Q All right. You said, I believe Mr. Hart, that you gave your records to Mr. Duchna, is that correct?

A Yes.

Q And was that at his request?
A Yes.
Q And did you give him all your business records?
A All I could possibly find.
Q And where were they stored, or if they were stored, where were they before you gave them to him?
A They was in my office in my desk, a lot of them was.
Q Is that located in your restaurant?
A No, that is in my home.
Q All right, the records were in your home in your desk?
A Most of them, yes, I have some old ones down in the cellar in a box.
Q And did you give all those to Mr. Duchna?
A I sure did.
Q You gave him everything you had, didn't you?
A Right, everything he asked for.
Q Were there any business records that you had for the years that he was investigating that you didn't give him?
A Not as I know of.
Q And when you say that Mr. Steiner and yourself recently went looking in your house, or went looking for records, were you looking for records other than the records that Mr. Duchna had?
A No, Mr. Steiner -- there was some records Mr. Steiner

didn't have, I think it was '69 or something, he was looking for '68 or '69, I don't know which, and he thought I had them, and I know Mr. Duchna gave me some stuff back, so I went down and looked through them and they wasn't there.

Q What kind of records were these?

A Back bank statements and stuff, cancelled checks.

Q But they are records that you had originally given to Mr. Duchna, is that right?

A Right.

Q And in fact, Mr. Duchna still had them, is that correct?

A He still had them, yes.

Q Are you still storing records in your basement today?

A No.

Q When did you stop doing that?

A I keep them all in my office now.

Q When did you stop storing them in your basement?

A When I had to throw away the tapes.

Q When was that?

A That is probably about 1964 or '65.

Q Is that when the firemen came there?

A That's right.

Q Who was that?

A The firemen?

Q Yes.

A I think -- I can't remember who it was, the inspector comes all the while.

Q He was a fire inspector?

A Yes.

Q From where?

A Glens Falls Fire Department.

Q And he directed you to remove your records from your basement?

A He does that over in my restaurant all the while to me, too, I think they do it every place.

Q Was it at that time that you removed them?

A I had those old tapes, so I threw them away.

Q That was what year?

A About '64, '65, somewhere around there. I figured the tapes were three years old so I threw them away, I didn't know you had to keep them six years, but I will keep the rest of them for six years.

Q When you had the meeting on September 16, 1969 with Mr. Duchna, is it your testimony that he showed you his credentials or his badge, that he told you that you could get a lawyer if you wanted one?

A I just told you that.

Q And that is all he told you?

A Right.

Q How about when you met with him on October 21 of 1969, do you recall that meeting in his office?

A I don't know, I was up there so many times I can't recall all the meetings I was up there.

Q How many times did you meet with Mr. Duchna during the course of this investigation?

A I really couldn't possibly tell you.

Q Well, would it be --

A (Interrupting) It was quite a few times.

Q Ten or fifteen or twenty?

A I couldn't tell you exactly.

Q Was it more than five?

A I'd say it was more than five.

Q Was it more than ten?

A I don't know, I couldn't tell you.

Q And where were these meetings held?

A Up in the Glens Falls Revenue Office up in the shopping center.

Q And is it your testimony that the first time that you became aware that there was an investigation into your tax situation was when you heard it on the radio, is that correct?

A When I was indicted, yes.

Q And when were you indicted?

A In 1972.

Q Wasn't it February of 1973?

A '72 or '73, somewhere around there.

Q So when you said that --

A (Interrupting) I heard it on the radio and it was in the paper, and I got that letter a couple of days afterwards.

Q And it is your testimony that you heard on the radio that you had been indicted?

A Yes, and I was going to be fined up to $10,000 and put in jail for five years.

Q Then you received this letter that is Defendant's Exhibit B?

A I believe that's it.

Q And were you indicted in February of 1973, is that correct?

A I believe so.

Q And what is the date on that letter?

A July 3, '72.

Q You received that letter in anticipation of being indicted, is that correct?

A I don't know what you mean.

Q Pardon me?

THE COURT: Isn't it clear to you now, because I want you to be careful about what your testimony is here now, you are under oath in a Federal

court, you said you got that letter two days, as I recall --

THE WITNESS: (Interrupting) Two days after I was indicted.

THE COURT: Now we have a record here when this indictment was returned. Is the original indictment there? What does it say on the back of it?

CLERK OF THE COURT: The original indictment was filed in this court at Albany, New York, February 21, 1973.

THE COURT: Now you heard that date, that is the official date it was filed, so this letter you were talking about that you thought you got two days after the indictment was filed is really seven months before, is that clear to you?

THE WITNESS: This one over here is the indictment?

THE COURT: That's right, that was filed by a Grand Jury and it was in February, and it is a court record, 1973. This letter you are talking about was a long time before.

THE WITNESS: Yes, this was July 3, 1972.

THE COURT: So you were mistaken, probably, weren't you?

THE WITNESS: I probably must have been.

THE COURT: All right.

THE WITNESS: I wish I kept the paper, in fact they had two cases --

THE COURT: At least we are sure you were indicted February '73.

THE WITNESS: Yes, I knew, I heard it two days before I got the letter.

BY MR. MUMFORD:

Q Mr. Hart, when you would turn over various records to Mr. Duchna, would he give you a receipt?

A Yes.

Q And would you sign that receipt?

A Yes, I signed the receipt.

(A document marked Government's Exhibit 1 for identification.)

MR. STEINER: If the court please, we will stipulate to the receipts, anything else signed by the defendant by way of receipts.

THE COURT: Well, see what he does, he is handling his side of the case now, if he wants to stipulate he can.

MR. MUMFORD: I would like to have these marked.

(Documents marked Government's Exhibit 2 for identification.)

BY MR. MUMFORD:

Q Is it your testimony Mr. Hart that Mr. Duchna did not give you any of these warnings or you just don't recall them?

A Mr. Duchna didn't what?

Q Did not give you any of these constitutional warnings, or are you telling us he never did?

A He never told me I was being indicted for any crime.

Q He couldn't possibly tell you that, I am asking whether he told you whether he was looking into the possibility of a violation with respect to your tax returns?

A I can't say that.

Q That he was investigating your tax returns?

MR. STEINER: I object to that question on the ground it is incompetent, irrelevant, immaterial, the question connotes civil liability and not criminal.

THE COURT: Overruled. Do you have any documents that he signed that had any warnings on them, just show them to him, maybe you should give him this advantage, because this man should have this opportunity to look at them. He is here under oath in a United States District Court.

BY MR. MUMFORD:

Q I will show you Government's Exhibit marked for identification No. 1 and ask you if you can identify that

for the court please?

A Yes, I signed it.

Q Is that one of the documents?

A That is one of the documents that was written in there, then he read it off to me and then I signed it.

Q O.K., and I will show you Government Exhibit 2, Exhibit 2 for identification and ask you if you can identify that please?

A Yes, I signed that too.

Q Is that another one of the documents, receipts, document receipts?

A Right, I signed a lot of them.

Q Did you sign that?

A Yes.

MR. MUMFORD: I offer Government's Exhibits marked for identification Numbers 1 and 2 in evidence.

MR. STEINER: I object on the ground that both are suppressible, the defendant has testified that he was not advised of his constitutional rights prior to the signing of Government's Exhibits 1 or 2.

THE WITNESS: Them was just receipts for the stuff.

THE COURT: You better look at them -- let me look at them. Overruled, I will receive both of them.

MR. STEINER: Exception.

THE COURT: You can read what it says there, can't you?

THE WITNESS: Yes.

THE COURT: On both of them?

THE WITNESS: Yes.

THE COURT: And that is your signature on them?

THE WITNESS: That is, yes sir.

THE COURT: One is dated April 13, the other September 16, 1969.

MR. STEINER: I respectfully call Your Honor's attention to the fact that neither one complies with the requirement of law, neither one carries out the requirement of the case law.

THE COURT: I can read them, I have read them, I have read the law on those things, at least it says a lot of things in there about your rights, doesn't it, Mr. Hart?

THE WITNESS: Yes.

THE COURT: Did you understand what that meant?

THE WITNESS: Yes.

THE COURT: Received.

(Government's Exhibits 1 and 2 for identi-

fication were marked in evidence.)

MR. STEINER: I repeat, if I may most respectfully, Your Honor, the writing doesn't carry out the requirements of the law as to the caution that should be given this witness.

THE COURT: No, overruled, he had testified that he had no warnings of any kind, as I recall.

MR. STEINER: He testified at least twice that he was told that he could have an attorney, that isn't sufficient.

THE COURT: Overruled. I will receive them, they are important documents.

BY MR. MUMFORD:

Q Mr. Hart, I am showing you Government's Exhibit No. 1 and ask you to read the last paragraph just over your signature, please.

MR. STEINER: I object Your Honor, it is not part of the writing, the U. S. Attorney is now referring to the small printed matter.

MR. MUMFORD: It is in the exhibit, I am asking him to read from an exhibit.

THE COURT: Let him read that, he is directed to read it. Can you read that paragraph?

THE WITNESS: No -- rights --

BY MR. MUMFORD:

Q Starting right here.

A Why don't you?

Q You read it.

THE COURT: See if you can read it. I want to find out if you can read it.

THE WITNESS: "The United States ---" I don't know what that is.

THE COURT: Let me see it. Can you see this part here (indicating)?

THE WITNESS: Yes.

THE COURT: Read that into the record.

THE WITNESS: "I have read --" I don't know what that is -- "to the statement --"

THE COURT: Speak up.

THE WITNESS: I can't see half that stuff, no, I can't read half of that.

BY MR. MUMFORD:

Q Was it your testimony that Mr. Duchna read this receipt to you, Mr. Hart?

A I can't remember that.

Q Didn't you testify earlier that when you signed these things --

A (Interrupting) He read quite a few of those things.

Q Do you recall him having read to you, remember, you signed this, "I have been advised of my rights under

the U. S. Constitution as to the submission of records and information on numerous times during this investigation as to the possible criminal violations of the Internal Revenue Service Laws"?

MR. STEINER: Don't answer. I object, Your Honor, the law holds that that is not sufficient as a cautionary measure in advising a prospective defendant of his constitutional rights.

THE COURT: Overruled. All right. Answer the question. Was that read to you?

THE WITNESS: I can't remember.

THE COURT: All right, that is your answer, you can't remember.

BY MR. MUMFORD:

Q You can't remember, that was back in April of '72?

A I can't remember.

Q Can you remember with respect to Exhibit No. 2 in September of -- on September 16, 1969, which is the date that you met with Mr. Duchna that Mr. Smith introduced him to you and he gave you a receipt, this Exhibit No. 2, and on that I am reading: "I am voluntarily submitting these records and I have been apprised of my rights against self-incrimination under the U. S. Constitution," and then it is signed Harry Hart.

MR. STEINER: I object on the ground that this is part of the motion to suppress. The witness has indicated clearly that he can't read, he couldn't read the other, there is nothing that shows at this moment that he was able to read or understand. The cases hold he must understand what his constitutional rights were.

THE COURT: Overruled. Reread the question.

(The Reporter read back the last question as above recorded.)

THE WITNESS: I don't know if that was read to me or not, I know I give him a lot of records.

THE COURT: Was that statement read to you?

THE WITNESS: I don't remember whether it was or not.

THE COURT: You don't remember?

THE WITNESS: No.

BY MR. MUMFORD:

Q Did he read these receipts to you before you signed them, do you remember that?

A No, I can't remember.

Q Didn't you testify earlier that when Mr. Duchna would give you one of these receipts, he would give it to you and then he would sign, is that what happened?

A Some of this other stuff.

Q Would you please answer the question.

A I don't know about that.

Q Is that what you testified to earlier?

A Some of the stuff, yes, I did read it, then I signed it.

Q Did he read this Exhibit 1 to you?

A '69?

Q No, No. 1 is in April of 1972, do you recall signing that one?

A Yes, that is my signature.

Q Did he read that to you before you signed it?

MR. STEINER: I object, Your Honor, unless there is evidence that the witness understood what was being read to him.

THE COURT: Overruled.

BY MR. MUMFORD:

Q I am asking whether or not it was read to you?

THE COURT: Was it read to you? Do you remember whether it was or not? It is an important exhibit here and I want you to know what you are stating here and what you are testifying to, was that read to you? Maybe you don't remember.

THE WITNESS: I don't remember if he read any of that stuff to me or not, that's all I remember, I signed receipts.

THE COURT: He is not asking you that, or I am not, did they read that statement to you?

THE WITNESS: I can't remember whether he did or not.

THE COURT: All right, he doesn't remember, so that is his testimony.

BY MR. MUMFORD:

Q Do you recall at anytime signing receipts that Mr. Duchna didn't read to you?

A I know I signed a lot of receipts, I can't remember that, if I did or not.

Q But wasn't the procedure during the course of this investigation that when Mr. Duchna would give you something to sign, he would read it to you first?

A No, I can't remember whether he did or not, I know I had to bring the books and stuff up there and he would give me receipts for them all.

Q Did you read these receipts yourself?

A What receipts, these here? No, I didn't, never did.

Q And you testified earlier that he read them to you.

A He read some of them off to me, and I don't know what ones they were, I don't know if they were receipts or something else about my business or something, I can't remember what it was.

THE COURT: Mr. Hart, did either one of

these agents ever state to you in any words that there would not be a criminal proceeding?

THE WITNESS: No, didn't say either way.

THE COURT: All right, they didn't say either way.

BY MR. MUMFORD:

Q And the first time that you met -- withdraw that. Defendant's Exhibit I which you have already seen is an affidavit, and you have testified that you signed that, right?

A Right.

Q And this is an affidavit you have testified, I believe, that you signed?

A Yes.

Q Did you swear to it? Do you know what an affidavit is?

A Yes, I swore to it.

Q And you swore to it, is that correct?

A Yes.

Q And is it your sworn testimony then in paragraph No. 4 at the initial interview and several other times "I was told that as a special agent, one of your functions was to investigate the possibility of criminal violations of the Internal Revenue Law."

A He never read that.

Q "I was further told on these occasions that as well as — I was further told on these occasions as well as today of my right to remain silent on any questions asked of me and not to furnish any data which might —" excuse me, I misspoke, any data, which right is afforded by the Fifth Amendment of the United States Constitution, and that I can or could seek the assistance of an attorney before answering or furnishing any information," is that your sworn statement?

A I don't -- I signed it but I don't remember him reading off that stuff to me or I don't --

Q (Interrupting) This is your sworn affidavit?

A I signed it, yes.

Q Was that your sworn statement in June, 1972?

A Must have been, yes.

Q And was that a truthful statement when you swore to it in June of 1972?

A In '72, yes.

Q And is it a truthful statement today?

A What do you mean today?

Q That statement that I just read to you at the initial interview and on several other times, you were told that as a special agent one of his functions was to investigate the possibility of criminal violations of the Internal Revenue laws?

MR. STEINER: I object, Your Honor, it is so clear that this statement did not --

THE COURT: I will sustain the objection.

MR. MUMFORD: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. STEINER:

Q Mr. Hart, who wrote these papers that purport to be your affidavits?

A Who wrote them?

Q Yes.

A Mr. Duchna.

Q Did he read every part of it?

A I can't remember if he did or not, I don't think so.

Q Did you understand?

A The only thing I understood was that these were receipts for these papers and books I give him, that's all I understood what they were for. I don't think I got any receipts.

Q At anytime did he make it clear to you that you had a right to remain silent and that by producing papers you might tend to incriminate yourself of a crime?

A He never told me that, no.

Q Did you ever understand that to be the situation?

A No, I never did, I never done nothing wrong, I couldn't understand what it was all about, I still today don't know what it is all about.

Q And isn't it a fact that he did say to you that if you owe any money to the government, we will collect it, or words or substance to that effect, or if we owe you any money we will pay you?

A He said to me, "If we owe you anything we will pay you, and if you owe us you will pay us."

THE COURT: When did he say this?

THE WITNESS: About the last meeting I had.

THE COURT: When?

THE WITNESS: That was --

THE COURT: What year?

THE WITNESS: I think it was in '72 sometime, I am not sure.

THE COURT: All right.

THE WITNESS: I can't remember, I says "I hope we can get this thing settled."

BY MR. STEINER:

Q Mr. Hart, you appear to be mistaken as to when you heard the news over the radio and read it in the newspaper that you had been indicted, were subject to a fine and to imprisonment, I now show you again--

A I can find out, I will show him that exhibit.

Q I now show you again, Defendant's Exhibit B in evidence, ask you to think hard and try to refresh your recollection as to the time that had elapsed between

this letter and the time you heard the news over the radio and read it in the newspaper.

A This letter says June 30, '72, July 3, 1972, the time elapsed and that was February that I got indicted -- well, I just can't remember just what it was, because I know when I got that letter I went and got a lawyer.

THE COURT: But when you got that lawyer, you weren't indicted yet, that is the point.

THE WITNESS: No, I wasn't indicted, I say when I got this other letter, no, this is the one I gave you, right?

BY MR. STEINER:

Q Yes.

A This is the one I -- when I got this, I went down and got a lawyer, that's the first time I had a lawyer all through this.

Q Who was that lawyer?

A Canale, then he took it and we was called in Albany, I believe.

Q But prior to your receiving this letter, you had many conferences, had you not, with Mr. Duchna?

A Yes.

Q Roughly, how many would you say?

A I couldn't even think about telling you.

Q Quite a few?

A Oh yes, I was running up there all the while. He called me up on the phone a couple of times.

Q I ask you once more, at anytime during all these interviews, did Mr. Duchna advise you, inform you, that you were under criminal investigation for tax evasion?

A No, he did not.

Q Or for any other crime?

A Nothing, no.

MR. STEINER: Nothing further.

THE COURT: Is that all?

RECROSS EXAMINATION

BY MR. MUMFORD:

Q Mr. Hart, is it your testimony that when Mr. Duchna would give you these receipts or affidavits, that you just signed them, is that correct?

A Yes.

Q Did you read them over?

A No, I never did.

Q Mr. Hart, can you read?

A A little bit, not too much.

Q Did he read these over to you?

A No -- some of them he did and some of them he didn't.

Q And you just signed them and did nothing more?

A No sir.

Q Showing you defendant's Exhibit marked H on the first page, paragraph 5 where a word has been crossed out, you initialed that, too, didn't you?

A I initialed it.

Q Aren't those your initials HH?

A I don't know if I was mine or not, could be.

Q And up here?

A Why should I initial it if I signed it?

THE COURT: Are those your initials, do you recognize your initials?

THE WITNESS: Yes.

BY MR. MUMFORD:

Q Where the word was crossed out, in addition to signing it, you initialed where the word was crossed out, is that right?

A It looks like my initials. Why should I initial it?

Q Because a word was crossed out, is that perhaps why?

A No, I don't know.

Q I am showing you now paragraph 2 where a word has been added and you also initialed that, too, didn't you?

A It looks like it, I don't know if I did or not.

Q Did you initial that?

A Well, it looks like my initial, I don't know if I did or not.

Q So not only did you sign it, but where any additions or corrections were made, you also initialed those too, didn't you?

A I don't know if I did or not.

MR. STEINER: I object unless the initials are pointed out specifically. The question is too general.

THE WITNESS: It looks like my initials.

THE COURT: Are those initials?

THE WITNESS: Those are my initials.

THE COURT: All right.

BY MR. MUMFORD:

Q Could we get your impression as to when it is, as you sit here today, when it was you first became aware there was a criminal investigation?

A When I heard it, I told you, on the radio.

Q Which is before you got this other letter?

A Before I got that letter, yes, two days before.

Q You heard about your indictment in February of 1973 before you got --

A (Interrupting) I don't remember the dates, but I can find out what date.

Q No, we are dealing with what your memory is here today, the fact is you are having trouble remembering that far back, aren't you?

A Yes. I know I got the letter two days after I heard it on the radio.

Q You are having trouble remembering that far back?

A Yes.

Q You couldn't remember what records Mr. Duchna had?

A No, I couldn't remember all of them, I give him all I had.

Q Didn't you testify that you thought you had records when in fact Mr. Duchna had them?

A Yes, I thought Mr. Duchna gave me back a lot of stuff, I told you that once.

Q And you had forgotten about that, hadn't you?

A No, I thought he gave me back the records that Mr. Steiner wanted.

Q But he hadn't?

A No.

Q So your memory was failing about those, wasn't it?

MR. STEINER: I object to the question.

THE COURT: Sustained.

THE WITNESS: What do you mean?

THE COURT: Sustained.

MR. MUMFORD: I have no further questions.

REDIRECT EXAMINATION

BY MR. STEINER:

Q Mr. Hart, did you write out any of these affidavits

yourself?

A No.

Q Did Mr. Duchna ask you whether you swore to the correctness of the affidavits?

A If I swore to them?

Q Yes.

A I can't remember if he did or not.

Q Did you subscribe them, that means sign them in his presence?

A Oh yes.

Q Now then after you signed them, did he ask you in words or substance, Mr. Hart, do you swear to the contents of this paper?

A I signed the things and then he went out, then he called me up and wanted me back up again.

Q But once more, did he ask you whether you swore to the contents of the writings?

A No, I can't say he did.

Q Is it your best recollection that he did not?

A My best recollection, he did not.

THE COURT: Mr. Hart, can you read very well at all, do you read the newspapers?

THE WITNESS: Once in awhile. I read it pretty good.

THE COURT: Can you read those affidavits?

THE WITNESS: No.

THE COURT: You can't read any part of them?

THE WITNESS: I never read them, no.

THE COURT: Those are your initials, you think?

THE WITNESS: Yes, I never even looked at them.

MR. STEINER: This is off the record.

THE COURT: No, put it on the record, anything we say in court is on the record.

MR. STEINER: We are in this unfortunate situation that the defendant went no further in his formal education than the sixth grade, and I am not sure that he completed the sixth grade.

THE COURT: We have had some presidents --

BY MR. STEINER:

Q Mr. Hart, did you finish the sixth grade in grammar school?

A No, I got out when I was 13 years old.

THE COURT: I understand his limitations. Did you keep the records in your restaurant yourself?

THE WITNESS: No, my wife keeps the records.

THE COURT: All right.

MR. STEINER: Nothing further.

I now move, if the court please, to suppress

the affidavits made by the defendant, Harry F. Hart.

MR. MUMFORD: Am I being precluded --

THE COURT: Let him make his motion. Make your motion, I will entertain it now.

MR. STEINER: I thought Mr. Mumford had finished. Namely, Defendant's Exhibits G, H and I, being affidavits purportedly made by him on January 12, 1972, May 25, 1972 and June 1, 1972.

THE COURT: Motion denied.

MR. STEINER: Exception.

THE COURT: Mr. Mumford, do you want to state anything, because I am at the point where I am ready to deny the entire motions, both of them that were filed. I am not impressed. I have heard the testimony, and the case law, of course, is settled, particularly in regard to the Second Circuit, and I am going to cite some of the cases for the record. One is United States against Sclafonti, 265 F 2(d) 408, Second Circuit. Certiorary was denied, 360 U.S. 918, the year was 1959, and I remember it well because I tried that case in Brooklyn for six weeks, and it was the beginning of the establishment of the rule that there is no absolute necessity for the IRS agents to warn taxpayers when making a routine audit, that is, moving over from civil to criminal purposes.

The next case in the Second Circuit is United States against Como, 340 F (2d) 891, page 894, 1965. U. S. against Pruden. If you don't hear me, you can get them from Mr. Miller, he will have them, 424 F(2d) 1021, 1035. That is the Fifth Circuit.

The point in those cases, and I find it here that it did not happen, IRS agents may not act so as to obscure the warning inherent in their investigations, that is, they can't assure the taxpayer that no criminal proceeding is contemplated, and Mr. Hart testified that these agents, the routine audit by Mr. Smith, the first agent, and then the special agent, that no assurances of that kind were ever given.

A leading Supreme Court is that the Miranda warnings are not necessary unless the questioning is conducted in these circumstances: in custody, or under circumstances which are inherently compelling, that was Mattice against United States, 391 U.S. No. 1, page 1, and the other case is United States against Squiry, 398 F2d 785 at page 788. That is a Second Circuit case.

So I find that the questioning that was talked about here by this defendant Mr. Hart, there were no inherently compelling circumstances, there was no coercion, and an important fact he testified

was that he was advised in the beginning as to his right to have an attorney.

Another leading case on that same subject came out of this court and was tried by Judge Port, it is United States against Caiello, 420 F(2d, 471, 474. Certiorary denied in that case 397 U.S. 1039.

There is a case in the Seventh Circuit, and I think Mr. Steiner had it in his brief, United States against Dickerson, 413 F(2d) 1111. As I see it here and that said that Miranda warnings must be given when the investigation becomes criminal in nature, but that case, of course, was not agreed with by the Second Circuit rulings by which I am bound.

So overall, I find nothing that shows over-reaching, in fact, I must find from the exhibits that are here before me that there were writings that gave sufficient warnings to this defendant, that the investigation was serious enough that any taxpayer would know from a routine audit that it could lead to criminal proceedings.

Many of the challenges, of course, are the documents that could be used during the trial, memorandum of agents which might be used under the Jencks Act to refresh, affidavits of the accountant and so forth, but in my judgment, they are not relevant at

all to the issue that we have here.

So it is my decision, I have made my finding, and the dominant finding is from what I heard here the agents in their investigation, in their auditing, acted properly and that all these records, statements and checks and items that were taken from the safe deposit box, were voluntarily turned over by the defendant Hart, that is my decision. You may have an exception.

MR. STEINER: May I add a word, Your Honor? The cases hold that merely advising a possible defendant, taxpayer, that he has the right to counsel, is not sufficient, there has been no rebuttal whatsoever.

THE COURT: I have made my decision. You have your exception. It is my judgment, I have made it, if it is wrong, you have a right to appeal. That is my decision.

Your motions are denied.

MR. STEINER: Exception.

THE COURT: So the trial now will start Monday at 9:30.

EXCERPTS OF MINUTES OF TRIAL.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA,

- against -

HARRY F. HART,

Defendant.

- -x

The trial of the above-entitled matter was held pursuant to adjournment on March 25, 1974, at ten o'clock a.m. at the United States District Court in and for the Northern District of New York, before HON. JAMES T. FOLEY, United States District Judge and a Jury.

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D A V I D T. S M I T H,

called as a witness in behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MUMFORD:

Q Mr. Smith, where do you reside, please?

A I reside in Mechanicville, New York.

Q By whom are you employed?

A By the Internal Revenue Service.

Q And in what capacity?

A I am employed as a Revenue Officer.

Q And how long have you been so employed as a Revenue Officer by the Internal Revenue Service?

A Approximately a year and a half.

Q And how long have you been employed by the Internal Revenue Service?

A Over nine years.

Q In what capacity were you employed by the Internal Revenue Service in 1969?

A I was employed as a Tax Auditor.

Q And where were you located with your office?

A In the Glens Falls Office.

Q Would you tell us please, the duties of a Tax Auditor?

A The Tax Auditor duties --

MR. STEINER: I object. There is no evidence that he was Tax Auditor covering the years '66, '67 and '68 and the records clearly show that he always signed as a Tax Technician for the years under indictment.

THE COURT: I am still going to let him tell the duties of a Tax Auditor.

MR. STEINER: That is irrelevant.

THE COURT: I will let him tell us. Overruled.

THE WITNESS: A Tax Auditor examines individual income tax returns.

MR. STEINER: I didn't hear that.

THE WITNESS: A Tax Auditor examines individual income tax returns to be sure they are correctly filed and are accurate.

BY MR. MUMFORD:

Q Pardon me?

A To be sure they are correctly filed and are accurate.

Q Very good. What is Tax Technician?

A A Tax Technician is an older term for a Tax Auditor.

Q It is the same function?

A The same function.

Q And you were a Tax Auditor in 1969; is that correct?

A That is correct.

Q Would you tell us as a Tax Auditor how many tax returns you have audited?

A Between two and three thousand tax returns.

Q Did there come a time, sir, when you were assigned the tax audit of Harry Hart?

A Yes.

Q And when was that?

A In January, 1969.

Q And what tax year were you assigned to audit?

A The year 1967.

Q And as part of that audit did you meet with Mr. Hart?

A Yes, I sent Mr. Hart an appointment letter to come to

the office with his appropriate business records.

Q And you did meet with him?

A Yes, I did.

Q During the course of your audit, sir, how many times did you meet with Mr. Hart?

A About half a dozen times.

Q Would you tell us what transpired or what developed as you audited the 1967 return?

A I began by adding the receipts in his receipt book to reconcile them to the return. Individual entries in the receipt book did not add up to the total receipts listed on the return. There was no explanation as to the difference, and I told Mr. Hart a more detailed analysis would be necessary, and I asked him to bring his bank statements and cancelled checks to the office.

Q And did he bring them?

A Yes, he did.

Q In fact, he cooperated with you, did he not?

A Yes, he did.

Q Tell us what happened then?

A I analyzed his bank deposits and business expenses paid by check and by cash, and there appeared to be an understatement of income, that the income was not fully reported on the return.

Q What did you do then?

A I contacted Mr. Hart and he came to the office and I asked if there was any explanation for the difference and he said there was none, that he did not understand it.

Q Then what did you do?

A I told Mr. Hart it would be necessary to audit the previous year, '66 and he brought his copy of the '66 return and the records for that year to the office, and I audited that and found a similar understatement of income.

MR. STEINER: I object to the general statement "a similar understatement of income." I have no objection, and in fact I would welcome a statement to show how much was understated, the exact figure.

THE COURT: He did say that about the '67 and you seemed to have no objection. He previously said that there was an understatement when he first spoke to him.

MR. STEINER: Yes, but now he has repeated in substance there was a similar understatement of income.

THE COURT: That is for the next year?

MR. STEINER: That's right. And I object on the ground it is much too general. I have no

objection if --

THE COURT: My point is there was no objection to the first understatement testimony he gave as I recall.

MR. STEINER: Perhaps I should have then.

THE COURT: Did you give us any definite testimony in that regard? I don't know.

MR. MUMFORD: May I interpose one suggestion and establish that at this time the audit was being conducted by Mr. Smith was a civil audit. Is that correct, Mr. Smith?

THE WITNESS: That is correct.

MR. STEINER: Civil audit?

THE COURT: But the point, Mr. Steiner, is, can this witness tell us definitely what that understatement was when he first made that examination. Can you?

THE WITNESS: No, sir, I can't tell you the exact amount. I could approximate it.

MR. STEINER: May I examine the witness preliminarily?

THE COURT: Not yet. No. Give us the approximate amount.

THE WITNESS: It was approximately 15 to 20 thousand dollars as to each year.

THE COURT: Was that in regard to income?

THE WITNESS: It would be unreported income or over-reported expenses. The analysis I made didn't determine it.

MR. STEINER: Then I have to move to strike out the witness' answer as completely incompetent, irrelevant and immaterial. He hasn't tied down the discrepancies, if any, to any particular year. Now we are right to the heart of the whole thing.

THE COURT: Motion denied.

MR. MUMFORD: I think these are all issues to be taken on cross-examination.

THE COURT: That's right. Motion denied. I assume there will be more particulars throughout the trial?

MR. MUMFORD: There will be.

MR. STEINER: May I say this, your Honor. That the witness himself has just testified that he doesn't know whether it was an understatement of income or overstatement of expenses. This certainly can't help the jury. It doesn't help me. I don't know what we are talking about.

THE COURT: You ask him those questions on cross-examination. All right, Mr. Mumford.

BY MR. MUMFORD:

Q Your function at this point in your 1967 audit was in reference to civil tax liabilities; is that correct?

A That is correct.

Q Now, would you tell us what you did after you made this audit of Mr. Hart's return?

A After I completed the audit of the 1966 return I asked Mr. Hart if there was any explanation for the difference, and he said no there was no difference. Then I told him probably some representative of the Internal Revenue Service would be in to see him in the near future, and I stopped the audit.

Q Would you explain to the ladies and gentlemen --

THE COURT: Wait a minute. Let's get more definite. Let's fix the time.

MR. MUMFORD: I was just about to do that, your Honor.

THE WITNESS: The audit, my civil audit started early in June, 1969.

BY MR. MUMFORD:

Q And would you explain to the ladies and gentlemen of the jury when your civil audit terminated?

MR. STEINER: I object on the ground it seeks for a conclusion. I have absolutely no objection to this witness stating what occurred.

THE COURT: All right. Sustained. Do you

remember that you told him that you were stopping this civil audit?

THE WITNESS: Yes.

THE COURT: And how did you do that?

THE WITNESS: Well, I just had no further contact with the taxpayer, Mr. Hart, after that time.

THE COURT: Where did you first tell him that you were stopping the civil audit?

THE WITNESS: At the Internal Revenue Service office in Glens Falls. I told him I would have no further contact with him.

THE COURT: And that was when, June you say of 1969?

THE WITNESS: Early in June, 1969.

THE COURT: All right.

BY MR. MUMFORD:

Q Would you then tell us what you did with the case?

A I prepared a referral to the Intelligence Division.

Q And what is the Intelligence Division of the Internal Revenue Service?

MR. STEINER: I object on the ground of hearsay.

THE COURT: Overruled.

THE WITNESS: The Intelligence Division

investigates the possibility of criminal tax violations.

BY MR. MUMFORD:

Q Did there come a time, Mr. Smith, when this matter of Mr. Hart's was assigned to someone in the Intelligence Division?

A Yes.

Q And when was that?

A That was later in June, 1969.

Q And did there come a time when you met with whomever it was assigned to?

A Yes.

Q And who was it assigned to?

A Mr. Joseph Duchna.

Q Is he a Special Agent of the Internal Revenue Service?

A Yes, he is a Special Agent.

THE COURT: How do you spell that name?

THE WITNESS: D-u-c-h-n-a.

BY MR. MUMFORD:

Q And after it was assigned to Special Agent Duchna did you then participate or assist in any way with Mr. Duchna's investigation?

MR. STEINER: I object. The question is leading. I have no objection to Mr. Mumford asking the witness what he did, but to putting words

in his mouth is not the way we should proceed.

THE COURT: All right. Sustained. You should reframe your question.

BY MR. MUMFORD:

Q What did you do after the case was assigned to Mr. Duchna?

A I assisted Mr. Duchna in any way that he requested.

Q Did you and Mr. Duchna meet with Mr. Hart at any time?

A Yes, we did. A number of times.

Q And about how many times during the course of the investigation?

A It was about 15 times.

Q During your conversations with Mr. Hart during the investigation, did you have an opportunity to observe with him his method of bookkeeping in his business?

A Yes.

MR. STEINER: I object again. Now, I am very reluctant to constantly object, but I must protect the rights of this defendant.

THE COURT: Absolutely. You have a right to object as much as you want, Mr. Steiner.

MR. STEINER: Well, I know, but I don't want to prolong this trial. I have no objection to Mr. Mumford asking the witness what occurred, but putting leading questions to him constantly is not

the way we normally would proceed.

THE COURT: Is that your objection as leading, to this question?

MR. STEINER: Yes, your Honor.

THE COURT: All right. Overruled. Read the question again.

(The Court Reporter repeated the question as follows:

"During each conversation with Mr. Hart during the investigation did you have an opportunity to discuss with him his method of bookeeping in his business?")

MR. STEINER: I further object. It calls for a conclusion.

THE COURT: Overruled.

BY MR. MUMFORD:

Q Would you tell us please, what Mr. Hart told you with respect to his method of bookkeeping in his business?

A Yes. Mr. Hart had a cash register with a tape.

THE COURT: You should fix some time and place. Where did this take place?

THE WITNESS: This took place at the Internal Revenue Service office in Glens Falls on September 16, 1969.

THE COURT: And who is there now?

THE WITNESS: Mr. Duchna, Mr. Hart and myself.

THE COURT: Now, tell us.

THE WITNESS: Mr. Hart had a cash register which had a recording tape. At the end of the day he would ring the button of the cash register so it would show the total sales for the day. Mr. Hart would then enter this total in his receipt book. He would total these daily receipts monthly, and then again at the end of the year he would give the total figure to his accountant.

BY MR. MUMFORD:

Q That would be one summary figure?

A One summary figure, yes.

Q Did he discuss with you any other books that he kept?

A Yes, he kept a disbursement book and used his check book to determine his business expenses.

Q How did he pay his business bills?

A How did he pay his business bills? His business bills were paid by check. A very small petty cash fund was kept. It amounted to less than five dollars a week and his net payroll payments to employees was in cash.

Q Other than his payroll and petty cash his payments was by check?

A And he took his personal withdrawals by cash, but the others were by check.

Q Did he explain to you how he drew up his disbursement book?

A Yes, he would total up the various items of expenses, amounts paid to the individual suppliers of food, liquor and beer, and operating expenses --

MR. STEINER: (Interrupting) Will your Honor pin the witness down as to when this occurred, that Harry F. Hart told Mr. Duchna and this witness that he totalled any books, as the witness just testified, that Harry Hart totalled the books.

THE COURT: Can you detail when these details were given to you?

THE WITNESS: This was at the September 16th meeting and meetings in the near future after that. I don't remember the exact dates.

BY MR. NUMFORD:

Q Did you discuss with him several times during these 12 or 15 meetings his method of bookkeeping?

A Yes, and we were told substantially the same thing each time.

Q And did he discuss with you his method of paying his employees, his payroll method?

A Yes. He would get the cash from the Thursday and Friday business and compute the payroll to be paid the employees and pay them from this cash. And from this

cash he also got his own personal withdrawals.

MR. STEINER: I move to strike out the witness' answer unless he can show when and where this occurred and who was present.

THE WITNESS: It occurred --

THE COURT: Wait a minute. Let me rule. He should specify, Mr. Mumford, as much as he can, when these conversations took place, where they took place and who was present. It is always important in this type of testimony.

THE WITNESS: This conversation, this meeting took place in the Internal Revenue Service office in Glens Falls, New York, again either in September or October, 1969.

THE COURT: When did he tell you about taking the cash from Thursday and Friday and paying the employees? How often did he tell you that?

THE WITNESS: He told us that a number of times, probably three or four.

MR. STEINER: And who was present, your Honor.

THE WITNESS: Mr. Duchna, Mr. Hart and I were present.

THE COURT: All right.

BY MR. MUMFORD:

Q And did he discuss with you his method of bank deposits?

A Yes, he did. Again at the same meetings he told us that he deposited the Monday, Tuesday and Wednesday receipts on Friday, and he also deposited the Saturday and Sunday receipts on Monday.

Q And the Thursday and Friday he used to pay the payroll; is that correct?

A That is correct.

Q Did you discuss with Mr. Hart the source of funds that he deposited in the bank account?

A Yes, we did, sir. At these meetings we asked him what his source of livelihood of the funds and they all came from the operation of his business, restaurant and bar.

MR. STEINER: I move to strike that out unless he can show when and where this occurred, who was present, and what Mr. Hart said. The witness is paraphrasing something that is so important in this case.

THE COURT: All right. Tell us now where the conversation took place in this regard, and who said what, and what was asked him.

THE WITNESS: This took place in the Glens Falls office. Mr. Duchna, Mr. Hart and myself were present.

BY MR. MUMFORD:

Q Mr. Smith, if I may backtrack, you accompanied Mr. Duchna at meetings which began sometime in September, 1969, is that correct?

A That is correct, sir.

Q And you said you had somewhere between 12 and 15 meetings; is that correct?

A Was Mr. Duchna present at each of those meetings?

A Yes, he was.

Q And was Mr. Hart present at each of those meetings?

A Yes, he was.

Q And where did all those meetings take place?

A All except two, took place in the Internal Revenue Service at Glens Falls.

Q And where the others take place?

A There was one meeting at the First National Bank of Glens Falls, and the other in the Hart home on September 13, 1969.

Q For what purpose did you have a meeting in the bank on September 16, 1969?

A Mr. Duchna asked Mr. Hart if he had a safe deposit box and Mr. Duchna asked if we could look at it in his presence.

MR. STEINER: If the Court please, I move for permission to examine preliminary as to what if

anything was given by way of caution, the fact that now a Special Agent had entered this case. I am talking, as you well know, about the Constitutional rights of this defendant under the 4th, 5th, and 6th Amendments.

THE COURT: Mr. Mumford, are you going to develop that?

MR. MUMFORD: Yes, I am, your Honor.

THE COURT: I think you should develop it.

MR. MUMFORD: I am trying to do this, if Mr. Steiner will give me a chance. I would like to develop these things.

MR. STEINER: Except the basis, the foundation should have been laid prior to this question.

BY MR. MUMFORD:

Q When you met on September 16, in the Internal Revenue office in Glens Falls, was that the first meeting which Mr. Duchna had with Mr. Hart?

A Yes, it was.

Q And would you tell us what occurred then, at the beginning of the meeting?

A I introduced Mr. Hart to Mr. Duchna and told Mr. Hart that Mr. Duchna was a Special Agent. Mr. Duchna then advised Mr. Hart what his function as a Special Agent was.

MR. STEINER: Move to strike out the answer as not responsive.

THE COURT: Overruled.

MR. STEINER: The witness wasn't asked that.

THE COURT: Overruled. Tell us what happened what was said at that first meeting.

THE WITNESS: Mr. Duchna told Mr. Hart that he was a Special Agent and told him his functions as a Special Agent.

THE COURT: Tell us what he said, his exact words.

THE WITNESS: His exact words I don't remember, but the gist of it was one of his duties was to investigate possible violations of the Criminal Code. He also advised Mr. Hart of his rights, that he did not have to testify and give any statements, and that he could have an attorney present if he wished. Mr. Hart acknowledged that he understood this.

THE COURT: What did he say?

THE WITNESS: He said, "I have nothing to hide. I don't wish to have an attorney."

MR. STEINER: Isn't that the -- I withdraw that. May I have the question read because the witness' answer was incomplete under the

Constitution.

(The Court Reporter repeated the question and answer as above recorded.)

MR. STEINER: The answer at the moment is incomplete.

THE COURT: Mr. Steiner, if you are going to insist on it, Mr. Mumford, you should put the Special Agent on at this stage and have him tell what warnings he gave.

MR. MUMFORD: That is fine with me.

THE COURT: You may have to do it that way if there is going to be an issue about it.

Do you recall anything more of what the Special Agent told him about his rights?

THE WITNESS: I don't recall if he told him any more about his rights. I just don't remember, sir.

BY MR. MUMFORD:

Q Would you tell us what you saw when Special Agent Duchna was giving those rights?

A Yes. Mr. Duchna had a card that had those rights and functions printed on it and he took this card from his pocket and read it to Mr. Hart.

MR. MUMFORD: If the Court please, I would like to have Mr. Smith step down and would like

to have Special Agent Duchna take the stand.

THE COURT: All right.

(Witness temporarily removed.)

J O S E P H A. D U C H N A,

called as a witness in behalf of the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MUMFORD:

Q Mr. Duchna, by whom are you employed, please, sir?

A By the U. S. Treasury Department, Internal Revenue Service.

Q And in what capacity?

A Special Agent of the Intelligence Division.

Q And for how long have you been employed?

A I have been employed over 20 years.

Q Did there come a time, Mr. Duchna, when you were assigned the case of Harry Hart?

A Yes, there was.

Q And when was that?

A June 23, 1969.

Q And did there come a time --

MR. STEINER: (Interrupting) I didn't get that.

(The Court Reporter repeated the question and answer as above recorded.)

BY MR. MUMFORD:

Q Did there come a time -- withdraw that. Did there come a time, sir, when you met with Mr. Hart?

A Yes, there was.

Q And when was the first time that you met with Mr. Hart?

A September 16, 1969.

Q And where did you meet with Mr. Hart?

A At the Internal Revenue Office in Glens Falls, New York.

Q Who was present?

A David Smith from the Audit Division, Mr. Hart and myself.

Q And at the beginning of that meeting would you tell the ladies and gentlemen of the jury what transpired?

A I was introduced to Mr. Hart by Mr. Smith from the Audit Division and he advised Mr. Hart that I was a Special Agent. I exhibited my credentials to Mr. Hart.

Q By your credentials, sir, you mean what?

A There is a shield and my authorization.

Q Do you have them with you today?

A Yes, I do.

Q Will you please exhibit them?

A (Indicates)

MR. STEINER: May I see them, your Honor.

THE COURT: Sure.

(The witness hands documents to Mr. Steiner.)

BY MR. MUMFORD:

Q Is it your testimony that you displayed this badge and shield to Mr. Hart?

A That is correct.

Q And what if anything did you say to Mr. Hart at that time?

A I told him I was a Special Agent from the Intelligence Division and I advised him of the function of a Special Agent. I then told him his rights under the Constitution of the United States against self-incrimination, right to a lawyer --

Q Do you recall what you said?

THE COURT: You should tell us the specifics.

MR. STEINER: That's right.

BY MR. MUMFORD:

Q Did you read to him from that card?

A Yes.

Q Do you have the card there?

A Yes.

Q Will you read to the ladies and gentlemen of the jury what you told Mr. Hart?

MR. STEINER: I object on the ground it is leading, your Honor.

THE COURT: Overruled.

MR. STEINER: I have no objection to what the witness told the defendant at that time, his words.

THE COURT: First you told us that you told him the function of a Special Agent?

THE WITNESS: That is correct.

THE COURT: What did you tell him?

THE WITNESS: That as a Special Agent one of my functions is to investigate the possibility of criminal violations of the federal law and the offenses.

THE COURT: Did you read to him from the card?

THE WITNESS: Yes. I then continued "In connection with my investigation of your books I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I can't compel you to answer questions or submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal prosecution which may be undertaken. I advise you further that you can, if you wish,

seek the assistance of an attorney before responding."

BY MR. MUMFORD:

Q And what if anything did Mr. Hart say to you?

A Mr. Hart said he understood his rights and that he was going to go ahead.

MR. MUMFORD: I have no further questions at this time, but reserve the right to recall Special Agent Duchna to the stand again.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. STEINER:

Q Mr. Duchna, who was present at this meeting of which you have just testified?

A David Smith from the Audit Division, Mr. Hart and myself.

Q And where did it occur?

A It occurred at the Internal Revenue Service office in Glens Falls, New York.

Q And on what date?

A September 16, 1969.

Q Do you have a report that you made of this conference?

A No, I don't, sir.

Q Well, you must have as a Special Agent. You and I have known each other for 20 years. As a Special Agent

Mr. Duchna, you are required are you not, to make a report to Mr. Bouthielier what occurred?

A We make a memorandum, if that is what you are referring to.

Q Isn't that a report?

A No, it is a memorandum of what transpired at that meeting.

Q And you submit to that Mr. Edward Carp (?), Supervisor of Intelligence?

A Yes.

Q And he in turn submits it to Mr. Bouthielier?

A I doubt that.

Q You doubt that?

A I doubt that.

Q In any event, you did carry out the requirements of the Department and the Service and you did prepare a memorandum?

A Yes.

Q Now, I request you to produce that memorandum?

A I do not have it with me, sir.

MR. MUMFORD: The record of the pre-trial discloses Mr. Steiner was given a copy of that memorandum long ago. I have another copy.

THE COURT: Do you have a copy?

MR. STEINER: Of this memorandum?

THE COURT: You must know what memorandum we are talking about.

MR. MUMFORD: We furnished a memorandum of all these meetings to Mr. Steiner.

THE COURT: All right.

BY MR. STEINER:

Q Mr. Duchna, I now show you a paper consisting of four sheets entitled "Memorandum of Interview in re Harry F. and Frances L. Hart; Time and Place, September 16, 1969," and ask you if this is the memorandum to which you have just testified?

THE COURT: So the record will demonstrate it, that memorandum was in your own possession, Mr. Steiner?

MR. STEINER: Yes. This memorandum is a photostat, your Honor, of a paper that you directed the United States Attorney to furnish to me.

THE COURT: I want to make sure the record is clear, because it wouldn't show where it came from. There was a moment of silence.

MR. STEINER: Let the record show that it came from my file.

THE COURT: All right.

MR. STEINER: And I had it perhaps two weeks.

MR. MUMFORD: May the record also show that

your Honor did not direct that that be given. Our office voluntarily gave it notwithstanding the order from the Bench that it did not have to be produced.

THE COURT: I think that is correct.

MR. STEINER: I don't want to quibble over words, but if you recall, your Honor sitting at this Bench directed Mr. Mumford to furnish it.

THE COURT: We can't argue about it, whatever I did. We have a memorandum here and you had it in your possession.

MR. STEINER: Yes, I did.

THE COURT: Whatever was said you have it.

MR. STEINER: Will you answer the question please?

THE COURT: Was that a copy of the memorandum that you made?

THE WITNESS: Yes, it is.

THE COURT: Of the September 16, 1969, meeting?

THE WITNESS: That is correct.

BY MR. STEINER:

Q Wasn't it at this meeting, Mr. Duchna, that you directed Mr. Hart and Mrs. Hart to make available to you their safe deposit box in the bank?

MR. MUNFORD: Your Honor, I object, please. We are going now to the proof. We are out of line at this point.

THE COURT: That's right. Mr. Steiner, he was put on the stand at my suggestion for a very limited purpose to see whether he gave the rights about which you raised a question and your examination must be limited to that.

MR. STEINER: Yes.

THE COURT: We can't get into other matters now or we will all be confused.

BY MR. STEINER:

Q When you advised the taxpayer of his rights, did you read from that card, Mr. Duchna?

A Yes, I did, Mr. Steiner.

Q And what was Mr. Hart's response?

A That he understood.

Q What else did he say?

A I have nothing to hide.

Q He didn't have an attorney at that time, did he?

A No, he didn't, sir.

Q And you advised him that the had a right to an attorney?

A He was so advised when I read from the card, sir.

Q By whom was he so advised?

A When I read from the card.

Q When you read that to him, what was his response, when you told him he had the right to an attorney?
A Mr. Hart just said he understood his rights, sir.
Q And that he had nothing to hide?
A Correct.
Q And did he hide anything?
A No, sir.

MR. MUMFORD: Objection.

THE COURT: He answered it.

MR. MUMFORD: I don't know how he can answer it.

MR. STEINER: I still don't know the nature of your objection, Brian. What is your objection?

MR. MUMFORD: To that question.

THE COURT: I overruled it, so we can move on.

MR. STEINER: I am in accord with your Honor's ruling.

THE COURT: That is delayed ruling, but I will let it stand.

BY MR. STEINER:

Q In your report you referred to the audit, but we have to go on.

THE COURT: Mr. Steiner, you must know the purpose why this witness was put on. It was to

satisfy your request that the warning was properly given, and you can cross-examine on that, but you can't get into other matters now.

MR. STEINER: Very well.

THE COURT: I am sure you appreciate that.

MR. STEINER: Yes. I was hoping when I ran into something --

THE COURT: You must have seen this memorandum before?

MR. STEINER: Yes, I have. I saw this last week or the week before.

Nothing further, your Honor.

THE COURT: All right, you may step down.

(Witness excused.)

D A V I D T. S M I T H,

resuming the stand, having previously been duly sworn, testified further as follows:

DIRECT EXAMINATION (CONTINUING)

BY MR. MUMPORD:

Q Mr. Smith, if we could go back, sir, please, to your telling us what Mr. Hart said, if anything during the course of the meetings that you had which began in September and which were held at the Internal Revenue Service Office at Glens Falls, what he said to you with

respect to his method of bank deposits and his payroll?

A Yes. He told us that he kept the Thursday and Friday receipts; he use to pay the cash payroll and had petty cash, perhaps five dollars a week, and he used for his own personal withdrawals, for personal expenses. He desposited into the bank his Monday, Tuesday and Wednesday receipts on a Friday, and he also deposited his Saturday and Sunday receipts on Monday.

Q Did he tell you whether he kept a record of these cash payments that he made to his employees?

A Yes, he kept a record.

Q And did he tell you if he kept a record of the cash which he got for himself for his personal expenses?

A He told us he did not keep such a record.

Q Is it your testimony that the remaining portion of his receipts were deposited into his various bank accounts?

A Yes.

Q Did he tell you what bank accounts he had?

A Yes. He had a business checking account at the First National Bank of Glens Falls and a personal checking account at the First National Bank of Glens Falls, and during those years, in 1968, he opened a savings account at that bank.

Q And is it from either the business or personal checking account that his business or personal expenses were

paid from?

A They were paid primarily from the business account, but some were paid from the personal account.

Q Did there come a time during the course of this investigation while you were under the supervision of Mr. Duchna that you discussed with Mr. Hart his business expenses?

A Yes. We discussed them many times, at many interviews.

Q Did you also discuss with him his cancelled checks?

A Yes.

Q And would you tell us what happened then, what transpired?

A We arranged his checks chronologically.

MR. STEINER: I didn't hear that. Will you repeat that.

THE WITNESS: We arranged his checks and listed them chronologically for the three years, and listed the payee and the amount of the check, and we left three columns blank for business expenses, personal expenses and payments of capital assets, and we asked Mr. Hart to come to the office and he identified each check and it was listed in the proper column as a business, personal.

BY MR. MUMFORD:

Q You say he identified each check. What do you mean by

that?

A He looked at each one and said that is was for either business, personal, or capital assets.

MR. STEINER: At this point I move for a direction of the Court to this witness to submit to me the memorandum or report that he then prepared as a result of this interview, to the end that I may examine it as the witness testifies.

THE COURT: You are entitled to that at the end of his examination unless you already have it.

MR. MUMFORD: He has it already. We gave him a memorandum of everything we had before the trial. He has it.

MR. STEINER: If the witness is testifying to the interview of September 16, that I have, and that is the one that was referred to while Mr. Duchna was on the stand.

THE COURT: Mr. Mumford, are there any memoranda of this witness?

MR. MUMFORD: Mr. Smith signed as a witness--as having been present at each of these meetings under Special Agent Duchna's name. They both signed each of the memorandums, any memoranda prepared by Mr. Duchna and Mr. Smith, and in fact they were signed and prepared and turned over to

Mr. Steiner.

THE COURT: Would they cover all the meetings that they had?

MR. MUMFORD: All of them.

THE COURT: So you must have those.

MR. STEINER: If Mr. Mumford is referring to the paper that he submitted to me about two weeks ago, two analyses of -- I have never to my recollection --

THE COURT: Wait a minute. You have the September 16, memorandum?

MR. STEINER: Yes.

THE COURT: Do you have any others of the other meetings?

MR. STEINER: Yes, I have others.

THE COURT: That is the point we are trying to find out. How many others do you have of those meetings.

MR. STEINER: I have Exhibit 2, which is a memorandum made at one o'clock at the First National Bank of Glens Falls in connection with the safe deposit box.

THE COURT: That is not Exhibit 2 in this case. We don't need any exhibit numbers.

MR. STEINER: But I am, your Honor, looking

for anything that might be helpful in connection with the analysis that the witness is testifying to.

THE COURT: Mr. Mumford, do you tell me now that you gave Mr. Steiner copies of memoranda of each one of these meetings?

MR. MUMFORD Everything I had, yes.

THE COURT: And they were signed by the Special Agent and by Smith; is that correct?

MR. MUMFORD: That is correct, your Honor.

THE COURT: So you may continue your questioning.

MR. STEINER: Before he does, your Honor, I think we are entitled to the relief under the Jenks Act. The witness has testified --

THE COURT: Under the Jenks Act, which is Title 18, Section 3500, you are entitled to any statement or memoranda after the witness finishes his testimony. Here you had them before hand.

MR. STEINER: I don't have them. I would be delighted to have your Honor or Mr. Scully show you these. These are what were submitted to me.

MR. MUMFORD: Your Honor, if Mr. Steiner can find anything in these memorandum, that is the thing he has to bring about on cross-examination.

THE COURT: I want to know if these are the meetings that you furnished, of these two agents?

MR. MUMFORD: Here they are.

MR. STEINER: And none of have has the slighest reference to the analysis of personal checks or any other checks. It is so vital to this case.

THE COURT: That is a point for you. You can get into it on cross-examination. Right now we are resolving the problem of whether you had this memoranda furnished to you. It looks to me like you did. The fact that they may not have certain checks in there, that is for you to point out.

MR. STEINER: I don't want to dwell too long on this, but the witness testified within the last 15 minutes that he reviewed with the defendant the analysis which showed personal checks, business checks and so forth.

THE COURT: That is his testimony. If you disagree with it, and you have something to contradict it, ask him on cross-examination. I know nothing about the case now except that I am here listening to the case with the jury. You may continue. As long as the testimony shows that these were furnished under the Jenks Act and that

they were furnished before hand.

BY MR. MUMFORD:

Q I believe you testified, Mr. Smith, that you met with Mr. Hart and he went through and described or designated to you each check, whether it was spent in personal or business or on capital expenses; is that correct?

A That is correct, yes.

Q And this was true for each of the years 1966, '67 and '68?

A Yes.

Q And having done this, were you able to reach a conclusion as to what business expenses were as shown by his cancelled checks?

A Well this --

Q I will withdraw that. I have no objection if he says he reached a conclusion.

A Yes.

THE COURT: Do you understand what he is asking you now?

THE WITNESS: I would like the question read.

THE COURT: Read the question.

(The Court Reporter repeated the question as above recorded.)

THE WITNESS: We added up all the business checks.

MR. STEINER: I object, unless the witness answers that question yes or no. He either did reach a conclusion or he didn't.

THE WITNESS: Yes, we reached a conclusion by adding up all the checks, by what the total business expense was paid by check.

BY MR. MUMFORD:

Q For each year in question, did you compare with the total business expense, as showed by the cancelled checks, did you compare that with the business expenses that were reported on the tax return for each year?

A Yes, we did compare them.

Q And how did the figure as represented by the cancelled checks compare with what was reported for business expenses?

MR. STEINER: I object. It calls for a comparison, your Honor. I dislike as much as you do to hear me object --

THE COURT: I didn't say I disliked anything. I am here to rule.

MR. STEINER: Well, I dislike to do it and I am confident the jury doesn't like it either. I have no objection to the witness stating what the figures were, what he found but merely giving us a comparison doesn't help us. It is only

misleading. He can say for the year 1966 he found business expenses to be whatever they were. And '67 I found such and such.

THE COURT: I think, Mr. Mumford, you should do that with this witness or any other witness.

MR. MUMFORD: I am not talking to Mr. Smith about his tax audit and tax deficiency. I want to get to his expertise and to the fact that there was a difference. As far as actual figures, we have numerous figures and they are going to come in check by check. We will get to that when we put Mr. Duchna on. I would like to put the case in my own order.

THE COURT: He can tell us whether there is a difference.

MR. MUMFORD: He will.

THE COURT: I will take it subject to connection.

BY MR. MUMFORD:

Q Did you make the comparison?

A Yes. Each year we compared it with the total paid by check and the amount reported on the ledger, and we found the checks to be substantially 10 to 20 thousand dollars in each year above the expenses paid by check, which would have been paid by check as against his

ledger.

Q So on his ledger he understated his business expenses?

A Yes.

MR. STEINER: May I have the figures by which this witness, this defendant understated his payments. This is the first time I heard this.

THE COURT: Overruled. I will take it subject to connection. They have to particularize it and I think they will.

MR. STEINER: Why wouldn't this be the appropriate time. It could very well be the end of this case. The witness just testified that the defendant understated his payments. That means he overstated his income tax.

THE COURT: They have to prepare it.

MR. STEINER: This would be the idea time to bring this out.

THE COURT: Mr. Smith, tell us what you did? You took the cancelled checks he gave you.

THE WITNESS: And we added up the business checks and compared them with the business expenses on the ledger, subtracted the cash payroll from the ledger which would have left the business checks, the business expenses paid by check and the checks we had added in our analysis added up

to considerably more than the business expenses paid by checks on his ledger.

BY MR. MUMFORD:

Q What effect would there be on the return if Mr. Hart had entered all of his business expenses?

A He would have ended up with less net profit or if he had a loss it would have increased his loss.

Q Now with respect to the returns of 1966 and '7 and '8, what effect specifically would it have on these?

A In 1966 his return had a loss, and this would have increased the loss.

MR. STEINER: Would have increased a loss?

THE WITNESS: Would have increased the loss.

BY MR. MUMFORD:

Q By how much?

A About 15 to 20 thousand dollars.

Q And he also showed a loss, a greater loss --

A In the neighborhood of perhaps $20,000. In 1967 his return showed a profit of approximately $8,000, and if we subtract this difference, this increased expenses then the return would have shown a substantial loss. In 1968 the return showed a loss and again you subtract this additional expense which would have increased that loss.

Q As a Tax Auditor what would this substantial loss, what

effect would that have on you as a Tax Auditor, if in fact the business expense as appeared from the checks had been claimed?

A The return would probably be more likely to have been selected for audit because he would show a greater loss than it actually did.

MR. STEINER: I hope, your Honor, I am not running out of bounds, but I am wondering if this is not an appropriate time to move for dismissal of the indictment.

THE COURT: Is that your motion? Because I can't let you make a statement of that kind. What is your motion?

MR. STEINER: Unless there is a tax deficiency we can't hold this man in court.

THE COURT: Is your motion to dismiss the indictment?

MR. STEINER: Yes. The witness himself has just testified there is no taxable income.

THE COURT: I deny the motion.

MR. STEINER: Unless there is taxable income there shouldn't have ever been an indictment.

THE COURT: Motion denied.

MR. STEINER: That is what I have been saying so long.

THE COURT: Motion is denied.

MR. STEINER: Exception.

BY MR. MUMFORD:

Q During the years '66, '67 and '68, Mr. Smith, did you give Mr. Hart any credits?

A Yes, in computing his income tax I allowed him an investment tax credit for each year.

Q What is an investment tax credit?

A An investment tax credit is a credit toward his income tax of 7 percent of a qualified investment, cost of deductible personal property, purchases and plus any business service during the tax year.

MR. MUMFORD: May I have a moment if your Honor please?

THE COURT: I think this might be a good time to take our afternoon recess.

MR. STEINER: Yes.

THE COURT: Remember my instructions ladies and gentlemen. Don't talk about the case amongst yourselves until it is finally submitted to you for a decision. We will take a ten minute recess.

THE CLERK: The court stands in recess for ten minutes.

(Whereupon at this point a recess was taken after which the trial was resumed.)

THE COURT: All right, Mr. Mumford.

BY MR. MUMFORD:

Q We were discussing, Mr. Smith, what the investment tax credits that you allowed or gave to Mr. Hart were for the years in question. Do you recall what those figures were?

A No, I do not recall the exact amounts.

(Document marked as Government's Exhibit No. 2-1 for identification.)

BY MR. MUMFORD:

Q I am showing you 2-1, Mr. Smith. Without reading from it, but reading to yourself, I ask you if that Exhibit marked for identification refreshes your memory what the figures were?

A Yes. For the year 1966 $259.31; for the year 1967 it was $29.17; for the year 1968 it was $310.45.

Q Did you discuss with Mr. Hart what his cost living expenses were during the year in question?

A Yes.

MR. STEINER: I have no objection to a yes or no answer, but nothing other than that.

THE WITNESS: Yes.

BY MR. MUMFORD:

Q And do you recall when it was that you spoke with him about this?

A It was at the first meeting and the subsequent meetings.

Q What did Mr. Hart tell you with respect to his cost of living expenses?

MR. STEINER: I object on the ground it is incompetent, irrelevant and immaterial. This is a case based on bank deposits, cash and expenditures, and has nothing whatever to do with his personal expenses. As I said before, your Honor, this is not a net worth case.

THE COURT: No. Overruled.

BY MR. MUMFORD:

Q Did he tell you what his estimate, his cost of living for each year was?

A Yes, he did tell us.

Q What did he tell you?

A The amounts?

Q What did he say his estimate cost of living was?

A He said it cost him about ten thousand dollars a year to live.

MR. STEINER: Three thousand?

THE WITNESS: Ten thousand, sir.

BY MR. MUMFORD:

Q Do you know how many dependents Mr. Hart had in 1966, '7 and '8?

A He had his wife and a dependent child.

Q Did you discuss with Mr. Hart whether or not he had any cash on hand?

MR. STEINER: I have no objection to a yes or no answer here.

THE WITNESS: Yes.

BY MR. MUMFORD:

Q And what did he tell you?

MR. STEINER: I object on the ground it is incompetent, irrelevant and immaterial, has nothing whatever to do with the bank deposit case.

THE COURT: Overruled. You may answer.

THE WITNESS: He told me at the initial interview that he kept approximately a thousand dollars cash on hand at the beginning of this period.

BY MR. MUMFORD:

Q Did he tell you whether or not that amount varied from the beginning of each year to the end of each year?

A He told me it did not change substantially.

Q Did you discuss with him the topic of loans?

A Yes.

Q What did he tell you?

A He told me he did loan some money in 1966.

Q Do you remember to whom?

A Yes, to a William Rogers.

Q William Rogers. Do you know who William Rogers is?

A I know William Rogers is his son-in-law.

Q Did he tell you how much he loaned his son-in-law?

A He loaned him $500, and then $2,500.

Q In what years were those?

A 1966.

Q Did you discuss with Mr. Hart whether he borrowed any money in the three years in question?

A He told us he did not borrow any money.

Q Did you discuss with him whether he received any inheritances or gifts during those three years?

A Yes.

Q What did Mr. Hart tell you?

A He told me he had no gifts or inheritances.

Q You discussed any other possible sources of income with Mr. Hart?

A Yes. I asked him and he said no he had no other source of income.

Q Did Mr. Hart tell you the source of the fund of deposits into his various banking accounts?

A Yes.

Q Where did he say that money came from?

A Came from the operation of his restaurant and bar.

MR. MUMFORD: I have no further questions,

your Honor.

CROSS-EXAMINATION

BY MR. STEINER:

Q Mr. Smith, you knew that Mr. Hart borrowed $40,000 from the First National Bank of Glens Falls in 1965, did you not?

A Yes.

MR. MUMFORD: Objection, your Honor. That is not a tax year in question.

THE COURT: Well, he answered. I will let it stand.

BY MR. STEINER:

Q When Mr. Mumford was telling you about borrowing, why didn't you say that to the Court and jury?

A I understood that the question was directed to the years in question, '66, '67 and '68.

Q But you knew in fairness to the question that you should have said that he had borrowed it.

THE COURT: Don't answer.

MR. MUMFORD: I object to the form of the question.

THE COURT: Sustained. The form is very objectionable and unfair.

BY MR. STEINER:

Q Did you verify the investment credits, Mr. Smith?

A I computed it from information on the tax return.

THE COURT: Tell us again what you mean by investment credit.

THE WITNESS: An investment credit was a 7 percent credit allowed against the income tax based on the cost of qualified deductible personal property used in the business which was purchased and placed in service in that business during the given taxable year.

BY MR. STEINER:

Q And the amount of the investment credit, the percentage, is based on the exhaustible life of the asset?

A Yes, it is.

Q Did you go into each of the assets that the defendant acquired to determine the exhaustible life?

A I accepted the lives given on the tax returns.

Q Do you have a schedule here that will show you, show us whether or not that investment credit was properly computed?

A I have an audit report.

Q Let me see it.

A I do not have it with me, sir.

THE COURT: Can you pick it out, Mr. Mumford?

(Mr. Mumfords hands document to Counsel.)

BY MR. STEINER:

Q Before we get into the computations, what is the difference, Mr. Smith, between a credit and a deduction?

A A deduction, a business deduction is taken from gross receipts. A personal deduction is taken from adjusted gross income to arrive at taxable income. A credit is subtracted from any tax.

Q So a credit is dollar for dollar just as though the taxpayer issued his own check in the amount of that credit; is that correct?

A Well, it reduces his tax liability.

Q It reduces it dollar for dollar does it not, so if a taxpayer owed $358 and had an investment credit of $358, that would wipe out his tax completely?

A Yes.

Q And if he had a tax of $358 and the credit was $360, he would be entitled to a refund of $2?

A Not directly. He would have to carry it back three years to a preceding tax liability. The refund would apply only against a prior paid tax.

Q So if a taxpayer was entitled to an investment credit in the year 1968 of "X" dollars and all that credit was not needed for that year, then you could carry it back, could you not?

A Yes.

Q And would you have carried it back to when?

A Three years.

Q So you could carry it back to '65, and if you didn't need it there would you use it in '66?

A Yes.

Q And if you didn't need it in '66 you could carry it to '67?

A Yes.

Q Did you do that?

A Yes.

Q Show us how you did it, Mr. Smith.

A If I could refresh my memory --

MR. MUMFORD: I object to that unless these are the computations we are talking about. This is not an exhibit which is marked for identification, and I object on these grounds that it pertains to civil liability. The criminal are different figures.

MR. STEINER: There is no difference.

THE COURT: What is that, Government's Exhibit 2-1?

MR. MUMFORD: It was only marked for identification to refresh his memory.

THE COURT: He wants to use it again to refresh his memory.

MR. MUMFORD: But this line of questioning is

going to the tax computation that is a civil computation.

MR. STEINER: Your Honor, it would do us all a service if we clarified --

THE COURT: It would be better to let it in.

MR. STEINER: Mr. Mumford just made a statement that there is a difference in dollars between a criminal liability and civil liability.

THE COURT: We don't want too much discussion about the propositions of the taxes, civil and criminal.

MR. STEINER: First, there is no difference in dollars whether it is civil or criminal, it is the same thing.

THE COURT: You are going to address yourself to this exhibit?

MR. STEINER: Yes.

THE COURT: We want to stay within the confines of this case.

BY MR. STEINER:

Q What was the amount, Mr. Smith, of the investment credit for the calendar year 1968?

A $310.45.

Q What did you do with it?

A I subtracted that from his income tax liability.

Q Show us your memorandum or report on which you credited the taxpayer $310.45.

A You have it there, sir.

Q You show me.

A Yes.

Q (Hands document to witness.)

A I may need the other part, sir, for the year 1968.

Q Yes. 1968. $310.65.

MR. MUMFORD: Can we have what tax year we are talking about?

MR. STEINER: What tax, Brian?

MR. MUMFORD: What tax year?

MR. STEINER: 1968.

THE WITNESS: Yes, I have it here, sir.

BY MR. STEINER:

Q The reason I picked '68 it has a carry back three years and a carry forward.

A Here is the computation that shows where $310.45 was subtracted (indicating).

Q Did you personally make that computation?

A Yes, sir.

Q And show us now, Mr. Smith, your work product which carries the computation in this amount.

A (Indicating) Well here is the computation. This shows the dollar amount of the investment and the applicable

percentage and then the 7 percent.

Q Now show us how you arrive at $4,435 representative of the cost of assets subject to a depreciation based on eight or more years.

MR. MUMFORD: Objection, your Honor.

THE COURT: Sustained.

MR. STEINER: This is cross-examination, your Honor.

THE COURT: Sustained.

MR. STEINER: By that do I understand he doesn't have to show how he arrived at the $310, which is nothing other than a conclusion?

THE COURT: Well, the $310, Mr. Smith, tell us what significance that has in this prosecution.

THE WITNESS: It was used in determining what the credit tax liability was because Mr. Hart was entitled to a credit.

THE COURT: And did you credit that to the taxpayer?

THE WITNESS: Yes.

MR. STEINER: Did he just take it out of the air? Unless he can tell us how he arrived at $310, it could have been more, it could have been less.

THE COURT: Could it have been more under

your computation?

THE WITNESS: No, sir.

THE COURT: Is your computation correct in your judgment?

THE WITNESS: Yes, it is.

BY MR. STEINER:

Q If it could not have been more, then you must have a worksheet that shows the assets acquired, their exhaustible life and the total, otherwise you could not have computed the investment credit.

A I did the computation of this investment credit from the information which was taken from the tax return for 1968.

Q Show us your computation.

A I have no computation to show, sir.

Q So if the assets acquired in 1968 subject to the investment credit, namely personal property with an exhaustible life of we will say eight years or more would have been 7 percent, if this acquisition has exceeded 44 hundred and 35 dollars, the investment would have been larger, wouldn't it?

A Yes, it would.

Q And it could very well have wiped out any purported tax that was then being considered?

MR. MUMFORD: Objection.

MR. STEINER: Cross-examination.

THE COURT: I will let him answer.

THE WITNESS: There is a limitation on the investment credit.

BY MR. STEINER:

Q What is that limitation?

A Twenty thousand dollars of investment.

Q As I say by the vaguest imagination this Defendant Hart was liabile for an income tax in 1968 of $20,000 --

MR. MUMFORD: Objection.

THE COURT: Sustained.

MR. STEINER: Cross-examination, your Honor. He just said --

THE COURT: I sustained the objection.

BY MR. STEINER:

Q You testified, Mr. Smith, on direct examination that the business expenses taken from the tax, your analysis of the tax, showed that the amount actually expended exceeded the amount deducted on the return, did you not?

A Yes.

Q And that went for the whole three years?

A That is correct.

Q Now then, may I see your work product that would have wiped out the purported tax for each of those three

years?

MR. MUMFORD: Object to the form of the question.

MR. STEINER: Cross-examination.

THE COURT: I am not sure what you mean by work product.

MR. STEINER: His worksheet. The Revenue Agent's.

THE COURT: First ask if he has any. I don't know if he has any.

MR. STEINER: I will find out.

THE COURT: That is the best way to find out.

BY MR. STEINER:

Q You testified that you made three analyses, did you not?

A With the Special Agent.

Q One analysis for '66, another for '67 and one for '68 and you also determined, did you not, that in each year the actual expenditures by check exceeded the deductions on the tax return?

A Yes.

Q Now, I want to know by what amount each of the analyses wiped out the income tax for its respective year.

MR. MUMFORD: Object to the form of the question.

THE COURT: Tell me why now, because I don't

know we are getting into heavy going.

MR. MUMFORD: He is inferring that this understatement of business expenses is going to wipe out all tax lien of the Defendant, and that is not what the testimony is and not what the facts are.

THE COURT: Let this witness testify and explain it.

MR. STEINER: This might be an appropriate time, your Honor, to have the record read back. If I understood the witness clearly, and I think I did, he testified that there was no taxable income for '66, '67 and '68, which was a surprise to me, because I thought there was. Whereupon I immediately rose and move to dismiss the indictment because from that if there be no taxable income there can be no criminal charge or any other charge.

THE COURT: I don't know. Is that a question to the witness or to me? I don't know.

MR. STEINER: I don't know.

THE COURT: It is a statement I think.

MR. MUMFORD: It is a summation.

THE COURT: It is a summation.

MR. STEINER: My grandchild might have a name

for it.

THE COURT: Here is a witness here. He is trained, and you are accepting him as a man knowledgeable in this business.

MR. STEINER: I will continue my cross-examination.

BY MR. STEINER:

Q Isn't it a fact, Mr. Smith, that you testified on direct examination that your analysis and Mr. Duchna's analysis for the years '66, '67 and '68 showed that the Defendant Hart, Harry Hart, had greater business expenses than he actually deducted?

A Yes, that I did.

Q And isn't it a fact, Mr. Smith, that right back of that you testified there was no taxable income for '66, '67 or '68?

A I testified that if these other expenses had been subtracted there would have been no taxable income.

Q There would have been no taxable income?

A Yes.

Q And that was right when I moved to dismiss the indictment because without taxable income there can be no criminal charge, civil or any other.

THE COURT: Is that your answer, that there could be no charge, Mr. Agent?

THE WITNESS: No. No.

THE COURT: Explain that.

THE WITNESS: We have been discussing the expenses. We have not discussed receipts.

BY MR. STEINER:

Q But you testified within the last ten minutes that the excess expenses would have wiped out the taxable income and would have reduced it to zero?

A If the taxable income and the return but if the gross receipts on the return had been accepted without adjustment.

Q You didn't say that.

A No.

Q Now, tell us the amount of any gross receipts that were understated.

A I can't give you the exact dollar amount without refreshing my memory, but I can give you an approximation.

Q I don't want an approximation. You have a work product. Isn't it a fact that you checked the cash receipts book day-by-day for three years?

A Yes.

Q Did you find one single penny wrong in the amount this man entered on his cash recipt book from the tapes or anything else that you checked?

A No, because there were no tapes available.

Q Why weren't tapes available?

A Mr. Hart told us he did not keep the tapes.

Q What else did he say?

A He said he recorded them in his book and discarded them because he had no further need of them.

Q What else did he say about the Fire Commissioner?

A He told us some years past he had a small fire and the Fire Commissioner had told him to clean out those records.

Q Didn't the Fire Commissioner according to Mr. Hart, tell him that the cash register tapes were a fire hazard?

A He stated that those records were a hazard.

Q And to clean them out?

A Yes.

Q And not keep them in the cellar?

A Yes.

Q That was the cellar of his restaurant?

A The cellar of his restaurant, right.

Q During your examination you had reason to check the Sales Tax, did you not?

A We took the Sales Tax into consideration. We did not adjust it. Mr. Hart told us he did not include it in income and did not deduct it as an expense.

* * * * *

Q You are sure that he told you he did not include it in income?

A Yes.

Q How would he have known the Sales Tax?

A He kept a separate tally of the Sales Tax.

Q Did you examine the separate talley of the Sales Tax?

A No, sir.

Q When you examined his cash receipts books day-by-day for all these days, was there a deduction in any one instance of the Sales Tax?

A No. The gross receipts for both the bar and restaurant part of his business were reported separately. Mr. Hart said that presented the gross sales of each of those businesses without the Sales Tax.

Q Was the Sales Tax deducted as an expense?

A On the return? No, sir.

Q How do you know that the receipts did not include the Sales Tax?

A There was no way of verifying it. I don't know.

Q But you did go to the bank, didn't you? You went to the First National and did get the receipts day-by-day?

A I went in the sense that I accompanied Mr. Duchna.

Q And didn't you find, Mr. Smith, that the Sales Tax was deposited twice every week in the First National Bank of Glens Falls?

A Yes.

Q Now I ask you as a Revenue Agent who is supposed to be fair with the taxpayer, did you give Mr. Hart credit for the Sales Tax?

A The payments of the Sales Tax were allowed to him when he wrote a check to reimburse the State.

Q Where was the Sales Tax allowed to him? Show me on the return, Mr. Smith. I now show you Government's Exhibit 1-1, being the individual income tax return of Harry F. and Frances Hart for the calendard year 1966, and I ask you to examine it thoroughly and tell the Court and jury where, if anywhere, the Sales Tax was deducted.

A The Sales Tax was not deducted on the return.

Q I now show you the same for 1967 and ask you to examine it thoroughly and tell us the Court and jury whether or not the Sales Tax was deducted?

A No, the Sales Tax was not deducted.

Q I show you the return for '68 and ask you to go through the same steps.

A The Sales Tax was not deducted.

Q Do you know the rates of the Sales Tax for those three years?

A I don't remember them, sir.

Q They were substantial?

A In '66 I think it was 2 percent, in the City of Glens

Falls.

Q How about Warren County?

A I believe it was 2 percent in '66. It began to increase but I don't know how high it increased to '68.

Q So you might reasonable expect the Sales Tax to be that imposed by the City of Glens Falls and the County of Warren?

A Yes.

Q In examining the return for 1966 and as a Tax Technician or were you then an Internal Revenue Agent?

A No, I was a Tax Technician, or Auditor.

Q In 1966 you were a Tax Technician?

A Yes.

Q Familiar of course with the tax laws or you wouldn't be a Tax Technician; am I correct?

A Yes.

Q You did observe that Mr. Hart and Mrs. Hart had acquired a property on Hudson Avenue fairly close to their restaurant and that acquisition was in 1963? Does that help you at all?

A I remember, yes.

Q Now then will you tell the Court and jury what you found in connection with that property?

MR. MUMFORD: Objection, your Honor. This is immaterial. 1963. It is not a tax year.

MR. STEINER: We are going to find that -- I will connect it if you will let the witness -- I am sure I will connect it very quickly.

THE COURT: The point is he says it was immaterial. We are talking about 1963?

MR. STEINER: That's right.

THE COURT: What bearing does it have on these tax years?

MR. STEINER: A very important part, because the structure was razed, demolished in '66 and unfortunately it was not noted on the tax return.

THE COURT: Mr. Steiner, you should not make those statements.

MR. STEINER: When you hear it, you yourself will be surprised that it could happen in this day and age where an expert makes a return --

MR. MUMFORD: I object to this whole line.

THE COURT: Sustained. You have to be very careful. This is a criminal prosecution and I am going to be here and preside fairly. We can't have a seminar on tax laws of the United States. We are here on three counts.

MR. STEINER: The seminar should have occurred before. What happened is --

THE COURT: We are not having one now. That

is the point, Mr. Steiner.

BY MR. STEINER:

Q Mr. Smith, as a Tax Technician I now show you Schedule D - I can't see it but it has to be Schedule D - of Form 1040 for the calendar year 1966, and ask you to examine and read line 13 to the Court and jury.

A Do you want the whole read or just the dollar amount thereon?

Q Whatever you want.

A It says if line 10 shows a loss enter here, and there was $1,000 entered there.

Q In other words, the preparer of that return, who was not Mr. Hart or Mrs. Hart, took a deduction of $1,000; is that correct?

A Yes.

Q What should that deduction have been?

A Zero.

Q What?

A Zero.

Q Zero?

A Yes, sir.

Q Zero?

A Yes.

Q And you are with the Internal Revenue Service?

A Yes, sir.

THE COURT: Yes, he is. Mr. Steiner, you know he is with the Internal Revenue Service, and there is no question about it. At least we established that.

MR. STEINER: The answer "zero" is so wierd.

THE COURT: He said it. That is his testimony. You can't characterize his testimony. This is what this man has said under oath and is telling us, and you have to accept it unless he is guilty of perjury.

BY MR. STEINER:

Q You found, did you not, by examining the return for 1965, that the property had been acquired in '63?

A Yes.

Q You also found that it was rented for three years prior to its demolition?

A I do not recall that, sir.

Q Didn't you examine the taxpayer's returns for prior years?

MR. MUMFORD: Objection to any prior years.

MR. STEINER: Cross-examination, your Honor.

THE COURT: I will let him answer. Did you?

THE WITNESS: I didn't thoroughly examine them.

BY MR. STEINER:

Q You didn't thoroughly examine them?

A I did not audit them.

Q But you ran into a deduction of $1,000 and thought it should be zero. Didn't that prompt you to make a report to your superior?

A No, sir. Make a report to my superior?

Q You mean you would have given away our money where a taxpayer had taken a deduction of a thousand dollars and shouldn't have taken any?

MR. MUMFORD: Objected.

THE COURT: Sustained. Did you give away the taxpayer's money?

THE WITNESS: No, sir.

BY MR. STEINER:

Q But you were telling us here, weren't you, that the taxpayer took a deduction of $1,000 and he should have taken zero; isn't that so?

A Yes, he should have claimed no deduction.

Q What did you do about that?

A I made an adjustment in my civil report.

Q When you say your civil report on which you made the deduction --

A This is a different report that we have seen previously.

Q Here is the so-called preliminary statement dated June 16, 1972.

MR. MUMFORD: Objection, your Honor. It is not in evidence.

THE COURT: Is it marked? I guess it is.

MR. STEINER: I don't know. They referred to it.

THE COURT: Marked for identification on the first page.

MR. STEINER: It is Government's 2-4 in evidence, for identification.

THE COURT: He may look at it.

MR. MUMFORD: I just don't want Mr. Steiner reading from it. I don't think it is proper.

THE COURT: Do you know what he is asking you now, Mr. Smith?

THE WITNESS: Yes, I do. Here is an adjustment of that $1,000, sir (indicating).

BY MR. STEINER:

Q And now isn't it a fact that the regulations and the rules of the Service require you to be impartial?

A Yes, sir.

Q And if a taxpayer is entitled to "X" dollars you should give him that?

A Exactly.

Q Isn't that so?

A Yes, sir.

Q And you are neither to favor the Government or favor the taxpayer?

A Yes.

Q Now, I ask you to look at Schedule D of form 1040 and tell the Court and jury how much that credit should have been.

THE COURT: Which one 1040?

MR. STEINER: The 1040 for '66.

THE COURT: What is the Exhibit number on it, so we know.

BY MR. STEINER:

Q I ask you to look at the Schedule line 5, tell the Court and jury the amount of loss as a result of the demolition of the property.

THE COURT: We are not clear yet. What Exhibit number is it?

MR. STEINER: The Exhibit is 1-1, your Honor.

THE COURT: Thank you.

MR. STEINER: In evidence.

THE WITNESS: On line 5, it says "realty".

BY MR. STEINER:

Q That is the one.

THE COURT: Read it.

THE WITNESS: Realty at 72 Hudson Avenue, Glens Falls, razed for parking lot. And he claims

a loss of $8,319.31.

BY MR. STEINER:

Q And now then why didn't you give Mr. Hart and Mrs. Hart credit for $8,319?

A Because they bought the property with the intention of making a parking lot.

Q You know, do you not, that they owned it for three years, they collected rent for three years, or don't you know?

A I am not sure, sir.

Q But you are a Tax Technician and you must have looked at their returns and made that observation?

A I honestly do not recall whether or not or how much if any was rent.

Q Did Mr. Hart tell you that he bought it to tear it down?

A He told us he bought it with the intention of making a parking lot.

Q Isn't it a fact that -- when did he tell you that?

A I do not remember the exact meeting.

Q Who was present when he told you anything like that?

A Mr. Duchna.

Q Isn't it a fact that he owned the property for three years, that he collected rent and drew off a small return, yes or no on that?

A I can't honestly say if I remember whether or not he

did.

Q Isn't it a fact that his business grew and the time came when they needed additional parking space?

A The business did show it did grow in size during the years.

Q The business did grow because the volume went up each year?

A Yes.

Q Some eighteen thousand dollars between '67 and '68; right?

A I can't say.

Q And the same amount between '66 and '67?

A It was a substantial amount.

Q Had a greater growth each year?

A Yes.

Q Didn't you inquire as a fair tax examiner for the Internal Revenue Service whether or not this demolition was deductible entirely, namely $8,319?

A I raised the question in my mind, yes.

Q Only in your mind. Whom did you discuss it with?

A I would have discussed it with Mr. Duchna.

Q Then you would have it in your report?

A It could be.

Q You have to report it to Intelligence?

A Our written reports only are made when the taxpayer,

Mr. Hart in this case, was present. We did not make a memorandum of our individual meetings.

Q You took it up with Mr. Duchna?

A Yes.

Q What did Mr. Duchna say?

A He said do what the tax laws require in this situation.

Q What do the tax laws require under these circumstances?

A The tax law requires that when a land is acquired with a building on it and the intent is to demolish the building, that the value of the building and the cost of demolition is to be added to the value of the land.

Q Now, when the property is held for investment and held three years, you as an expert in taxation must know whether or not the loss is fully deductible?

A Yes, I know.

Q Do you know?

A Yes, I know.

Q Now, I ask you was that loss fully deductible?

A No, sir.

Q You are saying now that that should have been zero?

THE COURT: That is his testimony.

A As I explained, the tax law --

Q That is his testimony, and you are an Internal Revenue Agent?

A Yes.

Q Who was your boss?

A My supervisor at that time was Robert Jacobson.

Q Where is he located?

A In the Albany office of the Internal Revenue Service.

Q What is his title?

A He was at that time the Group Supervisor.

Q Where is he now?

MR. MUMFORD: Objection, your Honor. That is irrelevant.

MR. STEINER: Oh, this is so important.

THE COURT: Wait a minute. I will allow you to ask him where are these people.

THE WITNESS: Mr. Jacobson is still working around the Albany office. I believe he is a Revenue Agent.

BY MR. STEINER:

Q A Revenue Agent would merely be a collector who doesn't make examinations?

A No. A Revenue Officer is the one who goes to the party. The Revenue Agent examines and audits the reports of partnerships, corporations, individuals.

Q So if a Group Supervisor now becomes a Revenue Officer it is a demotion?

A He became a Revenue Agent.

Q He was a Supervisor, now he moves down to an Agent?

A He was a Supervisor and checks auditors.
Q What is he now?
A A Revenue Agent.
Q You said he was an Officer before.
A If I did, I misspoke.
Q There is a difference, isn't there?
A Yes, there is.
Q A tremendous difference?
A Very much.
Q You testified, did you not, that Mr. Hart loaned his son-in-law, Bill Rogers, first $500?
A Yes, sir.
Q What year was that?
A 1966.
Q And then he loaned him some more money?
A He made a loan to William Rogers and his wife, Mary Ann.
Q When?
A In 1966.
Q How much?
A $2,500.
Q So he loaned them in all $3,000?
A Yes.
Q How did Rogers agree to pay it back?
A There was no specific agreement that we could determine.

Q Did he pay it back?

A The $500 Mr. Hart said might have been partly paid back at that time.

Q This case is based on bank deposits, is it not?

A Yes.

Q Show us where you gave the defendant credit for repayments by his son-in-law?

A There were no specific repayments, and we determined there was none.

Q There were no repayments?

A No.

Q Did you inquire?

A Yes, of Mr. Hart.

Q When did you inquire?

A At one or more of the meetings of Mr. Hart, Mr. Duchna and myself. I do not remember the date.

Q What period of time elapsed between the loan of $500 and the additional loan of twenty-five hundred dollars?

A Possibly five months. One was early in the year and one was in June.

Q Do you find checks here that represent both loans?

A No, sir, I did not find the checks.

Q Let me see your record that shows, your worksheet that shows -- just add up the amount of these loans and hopefully the understanding as to repayment?

A I do not have the worksheets, sir.

Q Did you ever have any worksheets?

A Yes, I did.

Q Where are they?

A I used the worksheets prepared by the Special Agent in preparing my report.

MR. MUMFORD: Are we talking about a memorandum?

MR. STEINER: No, his worksheets. He couldn't make a tax audit without a worksheet. It is impossible. I am entitled to see that worksheet. I want to see whether or not this defendant was given credit for the repayments, if any. Maybe there weren't any repayments.

THE COURT: Again, let's find out if had worksheets.

THE WITNESS: I do not have any myself. I used the Special Agent's work papers.

BY MR. STEINER:

Q As a Tax Technician you had to have worksheets.

A I had them during the civil audit, but when it was referred to Mr. Duchna of the Intelligence Division, I followed his direction.

Q And where are the worksheets, your work product, made during your civil audit?

A They are with the civil record. And I do not know, sir.

Q Did you turn them over to your boss?

A Yes. I forwarded them to my superior.

Q Who was your superior then?

A Mr. Robert Jacobson.

Q In Albany?

A In Albany.

Q Now a Revenue Agent or Revenue Officer?

A A Revenue Agent.

THE COURT: There are two loans, $500 and 25 hundred dollars?

THE WITNESS: Yes.

THE COURT: Did you see those checks?

THE WITNESS: Yes, I saw those checks.

THE COURT: Did you talk to Mr. Hart about repayment?

THE WITNESS: Mr. Duchna talked to him about repayment, and I was present.

THE COURT: What did he say about it?

THE WITNESS: Mr. Hart was vague on the repayment of the $500 loan.

MR. STEINER: Repeat that.

THE WITNESS: Mr. Hart was vague on the repayment of the $500 loan.

THE COURT: What did he say about the other one?

THE WITNESS: He said that had not been repaid yet.

BY MR. STEINER:

Q Did you tell the taxpayer if it was not repaid he was entitled to have it as a deduction, either as a bad debt or a capital loss?

A No, sir, I did not tell him that.

Q But you knew that to be a fact?

A No, sir.

Q You mean to say under oath as a Tax Technician of the Internal Revenue Service that you don't know that the non-repayment of a loan could very well constitute a deduction in this situation?

A A family relationship with no formal note, no demand for payment, it would not constitute a bad debt in any of the years in question.

Q Is there a destinction in the tax law, and I address this to you as an expert, is there a destinction in the tax law in regard to a loan which is made to members of a family?

A Loans made to members of a family have to be well documented to establish that it would be deducted as a bad debt.

Q This was well documented by a check?

A There were two checks when he gave the money, but no note as such with a specific time of repayment.

Q When you finished your examination on June 22 or 26, 1972, a period of six years have elapsed. Have the loans, the two loans, one of $500 and one of 25 hundred been repaid?

A I know the 25 hundred has not been repaid at the end of '68.

Q So the statute of limitations of six years had expired or was about to expire?

A The statute of limitations show a bad debt is determined when the debt was determined to be bad.

Q When was this determined to be bad?

A It was not determined in the years '66, '67 or '68.

Q You mean the six year statute began to run when Mr. Hart loaned his son-in-law the $500 and then 25 hundred?

A No, sir, no. As I understand the law, the law states that the debt becomes bad when there is no possibility of collecting it.

Q That is the deduction could be made when it is ascertained to be worthless or uncollectible?

A That's right.

Q When does the six year statute begin to run?

A I don't know.

Q Did you have business law?

A No, sir.

Q You had tax law?

A Yes.

Q You know when the six year statute starts?

A No, sir.

MR. MUMFORD: Object, he already answered that question.

MR. STEINER: It is incredible, your Honor, that this man --

MR. MUMFORD: I object to all these side remarks.

MR. STEINER: (Continuing) -- that this man who is an expert on Internal Revenue --

THE COURT: Are you accepting him as an expert?

MR. STEINER: No, that would be the last thing I will do, based on some of the answers I am now getting.

THE COURT: You are asking questions as an expert.

MR. STEINER: I am addressing this to him as an Internal Revenue man who should be expert in this particular subject, and when he says he doesn't know when the statute of limitations begins

to run, I couldn't possibly accept him as an expert.

THE COURT: I don't know either.

MR. STEINER: And you are holding me now --

THE COURT: I am not at all. He said he doesn't know and that is it.

MR. STEINER: I thought you were giving me the works.

BY MR. STEINER:

Q Assuming that the six year statute of limitations began to run when the loans were made, and you have my assurance that it did, and I am an expert, now then I ask you what would you have done in the year in 1972 when you realized that the six years have either expired or was about to expire?

MR. MUMFORD: Objection, your Honor.

THE COURT: I am inclined to sustain it, because we are getting far afield. Did you know about this debt in 1972 or did you find out about it in '68?

THE WITNESS: We found out about it in 1969, when we were with Mr. Duchna.

THE COURT: What did he tell you about it?

THE WITNESS: He said he loaned some money to his son-in-law and daughter.

THE COURT: Did he tell you that it was a bad debt?

THE WITNESS: No, sir.

BY MR. STEINER:

Q And you were in on the examination procedure preceding the indictment that was in June, 1972, several days before the indictment?

A Yes, sir.

Q Now then, six years have elapsed or was about to elapse, and I am asking you whether or not you considered giving the Defendant, the taxpayer, credit for the unpaid balance which would be barred by the statute of limitation?

A No, sir.

MR. MUMFORD: Objection, your Honor.

THE COURT: He answered. He said "no, sir".

MR. STEINER: He didn't give him any credit for it.

MR. MUMFORD: May the record also be clear, Mr. Steiner has testified inaccurately as to the date of the indictment.

THE COURT: It is '73, isn't it?

MR. MUMFORD: He said it was in June, '72.

MR. STEINER: I am mistaken, yes. Your Honor, I am mistaken. It was later. The letter from

Intelligence --

MR. MUMFORD: We don't need his testimony if your Honor please.

THE COURT: All right.

BY MR. STEINER:

Q You testified that the taxpayer had a thousand dollars in cash on hand, did you not?

A That is what he told me.

Q Where was that located?

A He said he kept it in his business. It was the normal business money.

Q That is known as a cash fund?

A Yes, sir.

Q But you didn't say that to the jury.

A No, I did not use the term "cash fund".

Q Isn't it a common practice for a business to have a cash fund?

A In my opinion, I never referred to it as a cash fund, no.

Q I have no quarrel with that. What is the purpose of cash on hand?

A To begin the operation of the daily business.

Q And cash checks for customers?

A Possibly.

Q And employees in the area bring in their checks and have

them cashed?

A In some businesses, yes.

Q Did you consider a thousand dollars excessive for a business that does two hundred and some thousand dollars a year?

A No, sir.

Q Not at all. Do you know how the $40,000 loan was handled?

A It was obtained --

MR. MUMFORD: Objection, unless we establish the year.

THE COURT: Sustained.

MR. STEINER: I can do that.

THE COURT: I sustained the objection.

MR. STEINER: We already know it was in '65.

MR. MUMFORD: Then that is my objection. It is a non-tax year.

BY MR. STEINER:

Q Was there interest due and payable on the $40,000 loan in '66?

A Yes, there was.

Q Will you refer to the 1040 and tell the Court and jury how much interest was deducted on that loan in the calendar year 1966?

THE COURT: Is that Exhibit 1-1?

THE WITNESS: Yes.

THE COURT: All right. We have to be clear on this record.

MR. STEINER: It should appear as a separate item.

THE COURT: We have three income tax returns.

MR. STEINER: Oh, '66.

THE COURT: Exhibit 1-1. That will allow us to trace it. I just want it for the record.

MR. STEINER: I beg your pardon. That is my fault.

THE COURT: He can tell us.

BY MR. STEINER:

Q Let me start it over again. Mr. Smith, I now show you Government's Exhibit 1-1 and ask you to look at the schedule of interest deductions and tell the Court and jury the amount of interest deducted on the loan made by the First National Bank of Glens Falls to Mr. and Mrs. Hart during the year 1965.

A The year, sir --

Q I am showing you the return for '66; the loan, Mr. Smith, was made in 1965.

THE COURT: Just look at the amount of interest paid on that loan.

THE WITNESS: The return does not show whether

the interest was paid. It shows an amount of business interest paid. It does not show to whom it was paid, sir.

BY MR. STEINER:

Q When you examined this return, as a Tax Technician, and knew at the time that the bank had loaned Mr. Hart $40,000, and you observed an interest deduction of only $19.97, you knew that something was wrong, didn't you?

A No, sir.

Q You knew that the interest had to be more than that?

A No, sir. I didn't know the rate or how much had been repaid.

Q Why didn't you inquire. You knew Mr. Frazier?

A No, sir.

Q You know where the bank is?

A Yes.

Q And you are a Tax Technician?

A Yes, sir.

Q Did you attempt to verify an item like $19.97?

A During the audit I was concerned with the gross business receipts.

Q You were not concerned at all with the deductions he was entitled to and didn't get?

A My civil audit never got that far before it was referred

to the Intelligence Division.

Q Is there a difference between a civil audit and a criminal audit, insofar as determing the tax due?

A A civil audit has to stop if there is an indictment and since it was turned over to Intelligence the civil audit was stopped.

Q But long before that you were required and still are required to verify the deductions?

A Certain specific deductions.

Q Here is one of interest, and interest carries a schedule, does it not, showing to whom the interest was paid, the amount; you know that that is so. You have probably seen hundreds of it.

A A bank has a schedule.

Q No, the form itself has a schedule for interest, interest paid and interest income and outstanding income?

A Yes, there is a schedule.

Q Now look at the return and tell us what you did to give the taxpayer credit for the interest that must have been paid during the calendar year of '66 to the First National Bank of Glens Falls on the loan of $40,000?

A From the return one can't tell to whom the interest is paid to nor the amount of the loan. I did however determine that there was a $40,000 loan but I did not

verify it during the civil audit.

Q Didn't you ask the bank what their interest rate was?

A No.

Q If you looked at the checks of Mr. Hart they would have shown the interest, wouldn't they?

A They would have shown a total payment.

Q You testified before that you made analyses of the years '66, '7 and '68 of the checks issued by the Harts?

A Right.

Q Now then these analyses must have shown interest?

A No, sir, the interest was computed in a different fashion.

Q In what fashion?

A The checks to the bank which are payments on capital assets or loans are totaled and then Mr. Duchna totaled the amount paid and allowed that deduction.

Q The interest would be a deduction whether it was paid on a capital asset or for any other purposes in the world, Mr. Smith?

A Yes.

Q Your loan has its interest and is deductible?

A Yes.

Q Now I ask you as a Revenue Agent why didn't you give the taxpayer credit for the interest that he was

entitled to deduct?

A He was given credit for it in the audit report I prepared.

Q Show us the audit report that gives him credit?

A That is Exhibit 2-1.

Q Did you testify that --

THE COURT: Wait a minute. You want to see that?

THE WITNESS: Yes.

BY MR. STEINER:

Q All right, show us where you gave the taxpayer credit for that interest.

A It is directly labeled as such, but it would be included in the business expenses paid by check.

Q But what you just referred to is labeled "business expense"?

MR. MUMFORD: Your Honor, I object to something not in evidence.

MR. STEINER: Well, this is cross-examination and the witness just referred to it.

MR. MUMFORD: It is not in evidence. Do you want to offer it in evidence?

MR. STEINER: I have no intention of putting anything like this in evidence.

MR. MUMFORD: Then you can't read from it.

MR. STEINER: Then I will let the witness read from it.

THE COURT: That is the same thing. It is not in evidence. I am not clear on this. This is $19.97 is it?

THE WITNESS: Yes.

THE COURT: Did you ever say that that money could be claimed by this taxpayer?

THE WITNESS: No, sir.

THE COURT: Tell us why you didn't pursue it with him?

THE WITNESS: There was an interest deduction on the return.

BY MR. STEINER:

Q But you testified earlier today that the taxpayer had failed to take all the deductions he was entitled to, and that your analysis sheet showed business expenses in excess of those deducted on the return; right?

A That is correct, sir.

Q Now then I point to the indictment I had just handed to me which refers to business expenses $19? 593.33, and ask wherein --

MR. MUMFORD: What are you reading, sir?

Q (Continuing) -- wherein there is interest, the allowance of interest in that amount?

MR. MUMFORD: That is exactly what my objection is about. Not only is it not in evidence but Mr. Steiner is cross-examining Mr. Smith on a computation of taxable income of which he didn't testify to. Mr. Smith was part of and working under Mr. Duchna in the criminal aspects of this case, and Mr. Duchna is going to calculate the taxable income. Mr. Steiner could cross-examine at that time. It was not Mr. Smith's function to do it. His examination had to do with the civil, which is not material to this case.

THE COURT: Sustained.

MR. STEINER: There is no destinction between a deduction on civil and criminal.

THE COURT: But the type of case is different, and the issue is different. I sustain the objection.

MR. STEINER: It is either interest or not interest.

THE COURT: I sustained the objection.

MR. MUMFORD: Mr. Duchna is going to make the calculation and the whole issue of interest will come up and we will show where the Government allowed him the interest. Mr. Smith didn't testify to that.

MR. STEINER: But he is a Government witness and he is the man that brought in the Intelligence Division.

THE COURT: I made my ruling and you should not continue on it.

MR. STEINER: Just one further question.

BY MR. STEINER:

Q Is this paper in your handwriting?

A Yes, sir, it is.

THE COURT: Maybe he can assemble it. Is that your paper?

THE WITNESS: Yes, sir.

THE COURT: Maybe you can assemble it.

MR. STEINER: I have already done it, your Honor.

One last item of inquiry, your Honor, and then I will I think have finished for the time being.

BY MR. STEINER:

Q You referred, Mr. Smith, to a savings account opened in 1968?

A Yes, sir.

Q Now then tell us in whose name the account was opened, the date and the amount?

A I believe I can say certainly, I believe it was a joint

account. I do not know the exact date, and I don't know what the initial deposit was without some investigation.

Q How do you know it was 1968?

A Well, that date sticks in my mind that is was the final year.

Q What else sticks in your mind?

MR. MUMFORD: Object to the question.

THE COURT: Sustained.

MR. MUMFORD: I am sure there is a lot that is sticking in his mind.

THE COURT: Lots of things may stick in his mind. What we want is what pertains to this case.

MR. STEINER: If one of these cases can't have a little humor, it just too bad.

BY MR. STEINER:

Q And now then what sticks in your mind, Mr. Smith, that the account was open in the names of Harry F. and Frances E. Hart?

A Just that all other banks accounts were jointly held.

Q And that is the only reason?

A Yes.

Q Was this in the First Bank of Glens Falls?

A Yes, sir.

Q Didn't you get a transcript of that account?

A Mr.Duchna did.

Q Yet you were making a civil examination and you held that examination for how long?

A I never instituted a civil examination for '68, sir.

Q When did you conclude the civil examination?

A It was in June, 1969.

Q And during all that time you had it, didn't you inquire of the bank for the details of the savings account?

A No, sir, I did not.

Q What sticks in your mind as to the amount in that account?

A The account at the end of the year?

Q Yes.

A About eight hundred dollars.

Q Eight hundred?

A Yes.

Q And how long had the account existed?

A Well, it began sometime in 1968, so it would be less than a year.

Q What verification, if any, did you make of the interest income on that account?

A Mr. Duchna secured a copy of information on that and it showed that there was some interest on that account.

Q Didn't Mr. Hart or Mr. Bo[illegible]n, his accountant, furnish you with a 1099 which would show the interest income

earned on that account.

A I never had it audited civilly as such on the 1968 return, inasmuch as it had just been filed on April 15th, presumably it had been filed at that time and I didn't start the civil audit --

Q Did you work with Mr. Duchna?

A Yes.

Q Didn't you look for a 1099?

A Mr. Duchna may have, I did not.

Q Weren't you interested in the interest income on that $800 savings account?

A I was interested in what Mr. Duchna asked me to do. Once he got into the picture it was under his guidance and under his jurisdiction, so to speak.

MR. STEINER: Nothing further, your Honor.

THE COURT: All right. Redirect.

REDIRECT EXAMINATION

BY MR. MUMFORD:

Q Mr. Smith, with respect to the Fire Commissioner and the instructions about removing the tapes because they were a fire hazard, when was the first time that you heard about that and why the tapes were missing?

A It was --- I don't remember the first time I heard it.

Q The first time you heard the statement about the Fire Commissioner?

A It was very recently, sir.

Q When was it?

A I believe it was last Thursday.

Q Of last week?

A Of last week.

Q Did you at any time during your investigation either prior to Mr. Duchna coming into the case and your meetings subsequently with Mr. Duchna in September, 1969, hear any account from Mr. Hart about the Fire Commissioner who instructed him to remove his tapes from his basement of his business?

A I don't remember that, sir.

Q When was the first time you heard about the Fire Commissioner?

A Last Thursday I remember.

Q Of last week?

A Of last week.

Q Now with respect to the interest you said that you did not got to the bank to verify the issue of this interest Mr. Steiner talked to you about?

A No, sir.

Q Do you know whether Mr. Duchna did that?

A Yes, sir.

Q Was that part of his investigation?

A Yes, that was part of his investigation.

Q And I believe you testified with respect to the business expenses as you determine them having gone through the cancelled checks with Mr. Hart, that that amount of business expense exceeded the business expense reported on the tax return for each year; is that correct?

A Yes, sir.

Q And you further said that had those business expenses been claimed on these returns that his net profit would have been reduced in substantial amounts?

A Yes, sir.

Q Up to as much as $20,000?

A Up to as much as $20,000.

Q And that is taking into account the total gross receipts as they are reported on the return; is that correct?

A Yes, sir.

Q And those total gross receipts as reported on the return were the figures that came from Mr. Hart as one summary figure that he gave to his tax preparer?

MR. STEINER: I object to that. It may be true or not, but it is not proper redirect examination.

THE COURT: No, I will allow it.

MR. STEINER: And this witness doesn't know.

MR. MUMFORD: I have no further questions.

MR. STEINER: Just one quick question.

RECROSS-EXAMINATION

BY MR. STEINER:

Q Mr. Smith, you testified a few moments ago that the first time you knew of the tapes and of the Fire Commissioner and so was two weeks ago?

MR. MUMFORD: That is not what he testified to, your Honor.

THE COURT: Let him testify.

THE WITNESS: I said it was last Thursday.

BY MR. STEINER:

Q Last Thursday?

A Of last week.

Q And who was present last Thursday when you were told for the first time that the Fire Commissioner had directed Mr. Hart to remove the cash register tapes as a fire hazard?

A The people I remember, I remember Mr. Hart was present, you were present.

Q Last Thursday?

A I believe so.

Q You never saw me before today?

A Yes, I have.

Q Yes, you did. But did you see me last Thursday?

MR. MUMFORD: He saw you too.

MR. STEINER: Oh, I forgot. I had forgotten

you were here. You sure were.

BY MR. STEINER:

Q Now then, when is the first time that you heard of the tapes?

A That is the first time I heard of the Fire Commissioner instructing him to throw them away, to the best of my memory.

THE COURT: Who told you about, if you know, about the Fire Commissioner and the tapes?

THE WITNESS: I don't know who it was, but I remember hearing it last week.

BY MR. STEINER:

Q And you heard that from the lips of Mr. Hart?

A Yes.

Q And only from his lips?

A And only from his lips.

Q Did you have any reason to doubt the truthfulness of what he was testifying to?

MR. MUMFORD: Objection.

THE COURT: Sustained. Those are questions for juries. He can give his opinion.

MR. STEINER: He is referring to testimony of Mr. Hart.

BY MR. STEINER:

Q May I ask this. Was Mr. Hart under oath when he

testified?

A Yes, he was, sir.

MR. STEINER: Nothing further, your Honor.

RE-REDIRECT EXAMINATION

BY MR. MUMFORD:

Q Back in 1969, during your investigation, did Mr. Hart tell you, or did he tell you why or what he did with the tapes?

A He told me he recorded the tapes in his receipt book and then threw them away or discarded them in some fashion.

MR. MUMFORD: No further questions.

MR. STEINER: Just one. I am reluctant to prolong this.

RE-RECROSS-EXAMINATION

BY MR. STEINER:

Q Did you say he threw away his receipt book?

A No, sir. I said he entered the total from the tape, or meant to say he entered the total from the tapes into the receipt book and threw away the tapes.

Q When did he throw away the tapes?

A Shortly after.

Q Wasn't that when the Fire Commissioner told him to get them out of the cellar?

A I understood the Fire Commissioner had told him to do

this many years before of the accumulation of the tapes, and Mr. Hart therefore in a short time would record them and then throw them away. He was not accumulating them any longer.

Q At the direction of the Fire Marshall as you subsequently learned?

A Yes.

MR. STEINER: Nothing further.

MR. MUMFORD: Subsequently, you mean last Friday by subsequently?

THE WITNESS: Yes, sir.

BY MR. STEINER:

Q Last Friday had nothing to do with the actual physical destruction of the cash register tapes, did it?

A Not then -- these tapes could not have been accumulated at the time of this fire, as I understood the date of the fire to be.

Q If you were listening to Mr. Hart's testimony under oath when he testified as to the fire, the Fire Commissioner told him to get the tapes out of the cellar, that they were a fire hazard?

A Yes, he did.

MR. STEINER: Nothing further.

RE-REDIRECT EXAMINATION

BY MR. MUMFORD:

Q I have one question, your Honor. I am directing your attention to Government's Exhibit 3-8, which is a savings account book.

A Yes.

Q And ask you in looking at this exhibit if you could tell us when the savings account was opened?

A The period starts on October 14, 1968, a deposit of $20.

MR. STEINER: Twenty dollars.

Q And between October 14, 1968, and the end of December, through December, 1968, how much was deposited into that savings account?

A The bank balance was $806.23.

Q And of that, how much was interest?

A There was $1.73 of interest included therein.

Q Had there been any withdrawals?

A No.

Q So it was in the neighborhood of slightly over $800 that was deposited between October and December of 1968?

A That is correct.

MR. MUMFORD: No further questions.

MR. STEINER: Brian opened the door on this.

RE-RECROSS-EXAMINATION

BY MR. STEINER:

Q Mr. Smith, where did the $20 come from that evidentally opened the account?

A Mr. Hart said his income came from the operation of his business.

Q That could have been his personal money?

A Well, it could have been personal or when it came from the business to his pocket.

Q It was never deducted as an expense?

A Not that we could determine.

Q You made an effort to determine expenses?

A Yes.

Q And you found it was never deducted as a business expense?

A And we found it was never deducted as a business expense.

Q And it was $20?

A Yes.

MR. STEINER: Nothing further.

MR. MUMFORD: No further questions, your Honor.

THE COURT: All right, you are excused.

(Witness excused.)

THE COURT: Ladies and gentlemen, we will take our recess now. We have had a productive day. We heard a number of witness. I am sure

* * * * *

Examining Officer's Activity Record.

AUDIT DIVISION
EXAMINING OFFICER'S ACTIVITY RECORD

David Lindell
DATE ASSIGNED 12-31-68

TAXPAYER H. F. & F. E. Hunt. PHONE NO.

ADDRESS (If different from that on return)

INITIAL CONTACT WITH Name Capacity Date

REPRESENTATIVE Name Address Phone No.

SUBSEQUENT CONTACTS

DATE	PERSON CONTACTED	REMARKS, NOTES, ACTION TAKEN			
1-30-69	TP	Interview			6 h
2-11-69	TP	Telephone, check spread			2 h
2-12-69	—	2775 " "			4 h
2-13-69	—	" "			4 h
2-17-69	—	Checked for missing checks			2 h
2-24-69	—	Check Spread			2 h
2-25-69	—	Workpapers			2 h
3-4-69	TP	Interview, with Edwin			1/4 h
3-5-69	—	Check Spread			1 3/4 h
3-6-69	—	Work Papers			4 h
4-21-69	—	Reviewed + corrected workpapers			1 h
4-29-69	TP	Interview, 2775			2 h
5-9-69	TP	" Wilcoll	62 1	44 4	5 h
5-12-69	-	Check Spread		4	4 h (40)
5-13-69	-	" "		3	3 h (42)
5-16-69	—	" "		2	2 h (43)
5-20-69		" "		2	2 h (47)
5-21-69	—	" " + deposits		2	2 h (49)
5-26-69	—	" " "		2 1/2	2 1/2 h (51)
5-27-69	—	" " "		1	1 h (52)
6-13-69	TP	Interview, 2797	2	6	8 h (60)
6-24-69	J. Dudna SA	Discussed Returns	1		1 h (61)

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE GPO 957-030 NAH FORM 3-[illegible]

Examining Officer's Activity Record.

AUDIT DIVISION
EXAMINING OFFICER'S ACTIVITY RECORD

David Smith
DATE ASSIGNED 12-31-68

Page 2

TAXPAYER H.F. + F.E. Hart

PHONE NO.

ADDRESS (If different from that on return)

INITIAL CONTACT WITH Name Capacity Date

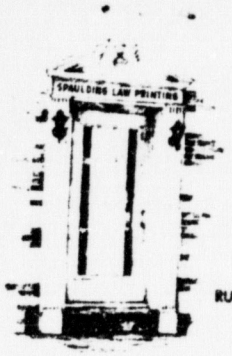
REPRESENTATIVE Name Address Phone No.

SUBSEQUENT CONTACTS

DATE	PERSON CONTACTED	REMARKS, NOTES, ACTION TAKEN		
Forward				(61)
8-1-69	—	Reviewed	2	(63)
8-26-69	J. Duclos, S.P.	Discussed rescheduling interview w/TP	1	(64)
9-16-69	TP, TPW, + S.A. Duclos	Interview	3/3	(70)
9-18-69	—	Sorting checks + bank statements	1	(71)
9-19-69	—	" " " "	2	(73)
1-14-70	—	Check spread 1969	(4)	77
1-15-70	—	" " "	(6)	83
3-9-71	S.A. Duclos	Discussed work plan	(1)	(84)
3-23-72	—	Reconciled rebus Forwards	7	(91)
5-24-72	TP	872 for 1966 + 1967	1	(92)
5-31-72	S.A. + TP	Telephone, Schedule A, 872 returned	1	(93)

Workpapers w/ 1968 return

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RE: UNITED STATES OF AMERICA v. HARRY F. HART

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:
CITY OF SYRACUSE)

EVERETT J. REA , being duly sworn, deposes and says:

That he is associated with Spaulding Law Printing Company of Syracuse, New York, and is over twenty-one years of age.

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~~(s)~~he personally served three (3) copies of the printed ~~[Record]~~ [Brief] and [Appendix] of the above-entitled case addressed to:

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U. S. Attorney for the Northern District of New York
Federal Bldg.
Syracuse, N. Y. 13201

on November 6, 1974.

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